United States Court of Appeals
FOR THE EIGHTH CIRCUIT.

No. 15,048.
CRIMINAL.

PAUL DILLON,
APPELLANT,

vs.

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

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[fol. 1] Indictment.

(Filed in U. S. District Court on November 13, 1953.)

In the United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America, Plaintiff,
v. 27678 (2).
Paul Dillon, Defendant.

The Grand Jury charges:

That on or about the 15th day of March, A. D., 1951, at St. Louis, within the Eastern Division of the Eastern Judicial District of Missouri, and within the jurisdiction of the Court aforesaid,

Paul Dillon,

of St. Louis, Missouri, did Knowingly, Willfully, Unlawfully and Feloniously attempt to defeat and evade a large part of the income tax due and owing to the United States of America for the calendar year 1950, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Missouri, at St. Louis, a false and fraudulent income tax return wherein he stated that his adjusted gross income for said calendar year was the sum of $1,526.11 and that the amount of income tax due and owing thereon was the sum of $32.00, whereas, as he then and there well knew, his adjusted gross income for the said calendar year was the sum of $2,526.11, upon which said adjusted gross income he owed to the United States of America an income tax of $189.00.

In violation of Section 145 (b) Internal Revenue Code, 26 U. S. C., Section 145 (b).

F nm 10,000 or I nm 5 y or b and costs.

[fol. 2] Second Count.

The Grand Jury further charges:

That on or about the 17th day of March, A. D., 1952, at St. Louis, within the Eastern Division of the Eastern Judicial District of Missouri, and within the jurisdiction of the Court aforesaid,

Paul Dillon,

of St. Louis, Missouri, did Knowingly, Willfully, Unlawfully and Feloniously attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1951, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Missouri, at St. Louis, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of $8,022.91 and that the amount of income tax due and owing thereon was the sum of $1,642.87, whereas, as he then and there well knew his net income for the said calendar year was the sum of $12,656.43, upon which said net income he owed to the United States of America an income tax of $3,264.01.

In violation of Section 145 (b), Internal Revenue Code, 26 U. S. C., Section 145 (b).

F nm 10,000 or I nm 5 y or b and costs.

HARRY RICHARDS,
United States Attorney.

[fol. 3] (Motion of Defendant to Dismiss Indictment and Request for Oral Argument.)

(Filed in U. S. District Court on December 14, 1953.)

I. The defendant moves the Court to dismiss Count I of the Indictment because it does not state facts sufficient to constitute an offense against the law of the United States in that it does not allege a substantial understatement of adjusted gross income or a substantial understatement of tax and does not allege an understatement of net income.

II. The defendant moves the Court to dismiss each count of the indictment on the following grounds:

(1) The Indictment does not state facts sufficient to constitute an offense against the laws of the United States.

(2) The Court is without jurisdiction because the defendant was not afforded an opportunity to present any facts or explanations before the Commissioner of Internal Revenue and the Department of Justice prior to the institution of this prosecution as required by the practice and procedure of those agencies and therefore was unjustly discriminated against and deprived of due process of law, contrary to the Fifth Amendment to the United States Constitution.

(3) The Grand Jury was without jurisdiction to indict the defendant because the defendant was not afforded an opportunity to present any facts or explanations before the Commissioner of Internal Revenue and the Department of Justice prior to the institution of this prosecution as [fol. 4] required by the practice and procedure of those agencies and therefore was unjustly discriminated against contrary to the Fifth Amendment to the United States Constitution.

(4) The statutes upon which the Indictment is based are unconstitutional because they deny the defendant due process of law as guaranteed by the Fifth Amendment of the United States Constitution for the following reasons: (a) Section 3761 of the Internal Revenue Code authorized the Commissioner of Internal Revenue and the Attorney General to compromise any civil or criminal case arising under the Internal Revenue laws without fixing any standard for such a compromise; (b) Section 3740 of the Internal Revenue Code forbids the commencement of any criminal case arising under the Internal Revenue laws without the approval of the Commissioner of Internal Revenue and the Attorney General, and also fails to fix a standard by which the Commissioner and the Attorney General shall determine when to authorize or sanction a criminal proceeding; (c) The failure to fix any standards allowed the Commissioner of Internal Revenue and the Attorney General to unjustly and unreasonably discrimi-

nate against this defendant by not affording this defendant an opportunity to compromise this dispute before the institution of this criminal proceeding.

(5) Each count of the indictment is void for duplicity for the reason that the allegations contained therein attempt to charge two or more offenses, to-wit: a violation of Section 145 (a) and Section 3616 (a) of the Internal Revenue Code.

(6) Each count of the Indictment contains no allegation other than the recitals of conclusions of law as distinguished from statements of ultimate facts sufficient to characterize the offense attempted to be charged as a violation of Section 145 (b) of the Internal Revenue Code, as distinguished from the offenses set out in Section 145 (a) or Section 3616 (a) of the Internal Revenue Code.

[fol. 5] (7) The Grand Jury had no competent evidence before it upon which they could base an indictment.

MORRIS A. SHENKER,
Attorney for Defendant,
408 Olive St., Ch. 6116.

Defendant requests oral argument.

[fol. 6] (Motion of Defendant to strike certain Matter from Indictment and Request for Oral Argument.)

(Filed in U. S. District Court on December 15, 1953.)

The defendant moves the Court to strike from the Indictment all references to Section 145 (b) of Title 26 of the United States Code, for the reason that the Indictment does not charge an offense under that section, but purportedly charges an offense either under Section 145 (a) or 3616 (a) of Title 26, United States Code, or Section 1001 of Title 18, United States Code.

MORRIS A. SHENKER,
Attorney for Defendant Paul Dillon,
408 Olive St., CH-6116.

Defendant requests oral argument.

[fol. 7] (Motion of Defendant to Suppress Evidence.)

(Filed in U. S. District Court on December 14, 1953.)

The defendant, Paul Dillon, moves the Court as follows:

1. To suppress as evidence all books, papers, documents, objects, financial statements, net worth statements, bank deposit data, memoranda and copies thereof, and all information obtained by the plaintiff directly or indirectly from the defendant after the Bureau of Internal Revenue began its investigation of the defendant for criminal prosecution.

2. To suppress as evidence all books, papers, documents, objects, financial statements, net worth statements, bank deposit data, memoranda and copies thereof, and all information obtained by the plaintiff directly or indirectly from the defendant.

The use of any of the aforementioned items as evidence against the defendant would contravene defendant's privilege against self-incrimination as guaranteed by the Fifth Amendment of the United States Constitution in that the defendant was not warned that he was being investigated for criminal prosecution nor was he informed that any answer he gave might be used against him in a criminal prosecution. The use of the aforementioned items as evidence would contravene the Sixth Amendment of the United States Constitution in that the defendant did not have the assistance of counsel. The aforementioned items of evidence were obtained by an unreasonable search undertaken without probable cause in violation of de-
[fol. 8] fendant's right to be secure from unreasonable searches and seizures as guaranteed by the Fourth Amendment to the United States Constitution.

MORRIS A. SHENKER,
Attorney for Defendant,
Paul Dillon,
408 Olive St., CH-6116.

[fol. 9] (Motion of Defendant for Bill of Particulars and Request for Oral Argument.)

(Filed in U. S. District Court on December 22, 1953.)

The plaintiff should be required to furnish the following information for each count of the Indictment.

1. The nature or kind of each item together with its source claimed by the defendant to make up the total gross income.

2. If any part of the total gross income claimed consists of items not shown on the books and records of the defendant, state the nature of any records which will be relied on to show such income.

3. A list of the items of the tax return claimed to be false and fraudulent.

4. The type and amount of each deduction against the claimed total gross income allowed and disallowed in computing the alleged net income.

5. If the plaintiff is computing net income under Section 41 of the Internal Revenue Code, state the means of computation; that is whether the computation is based on net worth, unexplained bank deposits, expenditures or by another method.

MORRIS A. SHENKER,
Attorney for Defendant,
Paul Dillon,
408 Olive St., CH-6116.

Defendant requests oral argument.

[fol. 10] (Transcript of Testimony at Hearing of Motions of Defendant to dismiss Indictment and to suppress Evidence.)

At a hearing on motions of defendant on the 23rd of December, 1953, the following testimony was offered:

On defendant's motion to dismiss the following testimony was offered:

PAUL DILLON the defendant testified in his own behalf as follows:

Direct Examination, by Mr. Shenker.

I am Paul Dillon, the defendant in this case. I was never advised at any time prior to the time of the indictment by any of the public officials, Commissioner of Internal Revenue or the Justice Department or the agents for the Bureau that criminal prosecution was being considered in connection with my income tax matters for the years 1950 and 1951. I did not receive any communication by letter or otherwise from the Commissioner of Internal Revenue advising me that this matter was ever being considered for criminal prosecution and affording me an opportunity to be heard.

I never received any communication from the Penal Division or the Chief Counsel's office of the Bureau of Internal Revenue wherein they advised me that my income tax matters for the years 1950 and 1951 was being considered for possible criminal prosecution. I did not receive any communication from the Justice Department wherein they advised me that my income tax matter for 1950 or 1951 was considered by that department towards possible criminal prosecution. I was not informed and did not have an opportunity to have a conference before either the Commissioner of Internal Revenue, the Penal Division, Chief Counsel's office or the Attorney-General's office.

The Court: Anything else to say on the motion to dismiss?

Mr. Shenker: No, your Honor.

The Court: Motion to dismiss overruled.

On defendant's motion to suppress evidence the following testimony was offered:

CARL WALLACE testified on behalf of the defendant as follows:

[fol. 11] Direct Examination, by Mr. Shenker.

I am Carl Wallace, an Internal Revenue Agent. In that capacity I had occasion to contact the defendant pertaining to investigation of his income tax for 1950 and 1951. I contacted him approximately the early part of 1952 in his office. No one was with me at the time. I asked him for his books and records to substantiate the income in his returns for the years 1950 and 1951 which he furnished me. I took some of the books and records with me. I don't recall the exact ones I took. I took records on two different occasions. I believe I took his records on income and expenses.

The records consisted of small black memorandum notebooks. As I recall, I only took the two books on the first call.

I saw him again in a week or so and I was still by myself. The second time I asked for his cancelled checks and he made a search for cancelled checks but were not able to get all of them for the entire year 1950 and 1951. Mr. Dillon made a search through his desk to locate the cancelled checks after I asked for them. He was unable to locate all the cancelled checks but he furnished the check stubs instead. I don't recall anything else.

I examined some cancelled checks but I took the check stubs. I did not take any bank deposit slips or bank book. I don't believe I examined the bank book or deposit slips.

The next time I saw the defendant was when he appeared at the Old Custom House on request of Special Agent Gastorf around June 20, to June 25th, 1952. I do not know how long it was from the visits that I made to

his office until this visit at the Old Custom House without consulting my diary. At the time the defendant appeared at the Old Custom House I still had his records. I had those records photostated immediately after I took them to my office. Then I went and got his check stubs and had them photostated. In June the defendant appeared at the Intelligence Division.

[fol. 12] Q. * * * Now, prior to the time that he appeared there, did you or your superior have a discussion with anyone from the Intelligence Division, pertaining to this matter, pertaining to Mr. Dillon's income tax records for 1950 and 1951? A. Yes, sir.

Q. And when was that discussion, do you remember?

Mr. Rehm: I object to this question. I don't think it is relevant or competent on the motion to suppress the evidence.

The Court: Sustained.

I contacted the Special Agent's office. I would have to consult my diary to determine when I contacted them in reference to the time of my presence in the case. I worked on a number of cases and I am not able to recall those dates. I couldn't do it without my diary, which is in the desk drawer upstairs. The contact was made with the Special Agents after the second visit to Mr. Dillon's office.

On the 20th or 25th of June, at the Special Agent's Office Mr. Dillon was requested there for questioning concerning some explained items that I wanted the answers to. I had asked him either the first or second trip for those answers. The purpose of his appearance at the 20th or 25th was to question him under oath. Neither Agent Gastorf or myself made any statement to Mr. Dillon as to anything pertaining to the matter under investigation besides asking for explanations. Agent Gastorf wanted the questioning and the defendant objected to his testimony being taken down. I began, put my question on this one particular matter, and asked him if he cared to furnish the names of various people whom he made payments to but he still refused to give me those names. I asked him to give me the names of some people to whom he claimed

to have made payments to and he still refused to give me the names of these people that he made these payments to. That was the sum and substance of the interview.

There was nothing said to him at that time about the matter being considered for criminal prosecution. I did see Mr. Dillon after that meeting. As to the time, there again I would have to consult my diary but I am pretty [fol. 13] certain I did see him at least once. I don't recall any conversation or what took place at that time.

I never told Mr. Dillon, nor did anyone in my presence, at any time that he was being considered for criminal prosecution.

When I contacted the Special Agent in connection with Mr. Dillon's income tax returns for the years 1950 and 1951, that was for the purpose of making an investigation for possible criminal prosecution. Mr. Dillon's returns were assigned to me originally for 1950 and 1951.

Cross-Examination, by Mr. Rehm.

In June, 1952, I went to Mr. Dillon's office. That is the time he turned over to me the memorandum book which had his income and his expenses in it. He was not under arrest at that time. Nor was he charged with any offense. At that time he was not threatened with prosecution. He was not coerced in any manner when he turned the books over to me. My purpose of contacting Mr. Dillon was to determine his civil tax liability.

Redirect Examination, by Mr. Shenker.

I don't recall receiving any records from Mr. Dillon in addition to those I testified to. There were three records I got. The record of income, expenses and the check stubs. I don't recall the dates I returned the records. They were returned considerably after the conversation with Mr. Gastorf.

I never had a complete list of his cancelled checks; that is, for the entire 12 months in any one year. I believe that the first time I called on Mr. Dillon I did take some cancelled checks, but I mean they were not complete and were of no value. He said he wanted them back, the cancelled checks back, and requested the checks as I recall it. I believe I did have his cancelled checks. I am not positive

on something like that, but I believe I did take his cancelled checks. I don't think there were any photostats. They weren't of any value as I recall.

Recross-Examination, by Mr. Rehm.

At the time of my second trip, the purpose of the trip was still for the purpose of determining federal tax liabil-
[fol. 14] ity and no criminal prosecution was threatened at that time.

JACK GASTORF testified as follows:

Direct Examination, by Mr. Shenker.

I am Jack Gastorf, a Special Agent with the Bureau of Internal Revenue. As a Special Agent I investigate for criminal tax fraud. I had occasion to work on the case of Paul Dillon on the tax matters for the years 1950 and 1951. I first got in the case in the early part of March, 1952. After I got in the case I had a conference with Mr. Dillon at the office of the Intelligence Division. That is the first time I saw him. He came there in response to a letter that I had written.

On that occasion I was introduced first of all to Mr. Dillon by Mr. Wallace. There was present a recorder, Mr. Wallace, Mr. Dillon and myself. Mr. Dillon refused to be sworn in to give any testimony under oath and also requested that we dismiss the recorder before he would say anything to us, which I did. Then I asked Mr. Dillon questions relative to various payments that he claimed that he had made to individuals and asked him to whom he had made certain payments and he refused to divulge any names of those persons. There were some questions that I asked him relative to income and about his records. There was no other conversation. No one said anything at that conference that Mr. Dillon's income was being investigated for the purpose of determining possible criminal prosecution. Nothing was said about possible criminal prosecution.

About a week later, I think that the date of the conference in the following week was the 23rd of June, and a

week later, or June 30th, I saw Mr. Dillon at his office. Revenue Agent Wallace was with me. I asked Mr. Dillon some more questions relative to income that he received and also requested again that he substantiate the deductions that he was claiming by naming individuals to whom he had advanced those and he refused. There was no other conversation at that time that I recall specifically. Nothing was said to Mr. Dillon by either me or by Agent Wallace pertaining to possible criminal prosecution. [fol. 15] I never saw Mr. Dillon at any other time. I was the only Special Agent that worked on this case.

I was called into the case on March 3, 1952. The first time I saw Mr. Dillon was in June. In March Agent Wallace turned over to me books and records that he had received from Mr. Dillon. I never received any additional books and records from Mr. Dillon after March 3, 1952.

Q. • • • Now, were those books and records which were turned over to you by Agent Wallace the basis that furnished the information on which you conducted your investigation for criminal prosecution?

Mr. Rehm: I object to that as calling on conclusion on the part of the witness.

Mr. Shenker: Well, he made the investigation.

The Court: Sustained.

It was necessary for me to use Mr. Dillon's books and records that were turned over to me by Mr. Wallace to carry on my investigation to determine whether criminal prosecution was justifiable. Those books were the start. I used the information in those books.

Cross-Examination, by Mr. Rehm.

Mr. Dillon did not turn the books and records over to me personally. The books I used came from a lot of records which Mr. Wallace had previously gotten from Mr. Dillon.

CARL WALLACE upon being recalled to the witness stand testified as follows:

Direct Examination, by Mr. Shenker.

I was assigned Mr. Dillon's returns for 1950 and 1951 some time before March 3, 1952. As I recall the 1951 return was not available to me until later in 1952. I think it was possibly July or August before I got the 1951 return. I was investigating the 1950 return, and as I recall it was 1951 or subsequently made a part of the investigation.

I got records for 1950 and 1951 when I first saw Mr. Dillon, and I asked for those records. Those records for 1950 and 1951 were all in one book. I got the one book called the records for 1950 and 1951. Check stubs for 1950 and 1951 were in one book. Cancelled checks were not.

[fol. 16] Q. But you did ask for the records for 1950 and 1951, isn't that correct, sir?

A. I don't recall whether I asked for them specifically for 1951, or not. I rather suppose that, if I do recall correctly, I think I did have a 1949 return and possibly 1949 and 1950 records that I requested. There again I would have to consult the file on it to determine, because I can't recall that. I am positive I did that for 1950 and 1951, but whether any earlier, I am not certain.

Mr. Shenker: If the Court please, in view of this witness' statement that he would have to consult his file as to whether he made a request for 1951 also, I consider that of importance, I wonder whether the witness might be asked to consult his file and advise on it.

The Court: He didn't say that he asked for the 1951 before he got the 1951 return.

I did not ask for any records other than the return that I had at that time—I asked for the records. I started my examination of Mr. Dillon's income tax returns. Now, whether 1951 could be—well, it just wasn't filed yet, I couldn't have begun examination of it, I didn't have the return. I mean it is as simple as that. I am sure that I did not have the cancelled checks for 1951 before I was assigned the 1951 tax return. Later, I believe I did see

the cancelled checks but I never did take them out of his office. I am sure of that. I saw Mr. Dillon several times, and I didn't make notes of those various details. I am certain that my records would not show whether or not that I had 1951 checks or 1950 checks. Those are details which I would not make a memorandum of. I saw Mr. Dillon after seeing him in Mr. Gastorf's office. My diary would show whether I ever saw him after that pertaining to his income tax matters. If I didn't so show an appointment in my diary, I didn't see him. I mean, if I could consult my diary. I don't recall having seen him. I don't recall what day I received the 1951 return.

Which was all the testimony offered at the hearing.

[fol. 17] Order of District Court overruling separate motions of defendant to dismiss, strike and suppress and conditionally overruling defendant's motion for a bill of particulars.

Clerk's Docket Entry of December 23, 1953.

. . . Separate motion of deft. to dismiss and suppress, argued, submitted and overruled. Motions of deft. for bill of particulars . . . argued, submitted and overruled on condition that Gov't supply information in question. Deft.'s motion to strike, argued, submitted and overruled . . .

[fol. 18] Bill of Particulars.

(Filed in U. S. District Court on February 16, 1954.)

Comes now the United States of America and voluntarily supplies the information requested in defendant's motion for a bill of particulars and says:

As to Paragraph 1, the nature of the items claimed by the plaintiff to make up the total gross income is as follows:

(a) Income as listed in the tax return for the years covered by Counts I and II.

(b) Fees for legal services from Thomas Packs and Sam Broadhead.

(c) Income from gambling.

As to Paragraph 2, plaintiff states generally the nature of the records which will be relied on other than those shown on the regular books and records of the defendant will be as follows:

Bank records; records of Thomas N. Packs and Thomas N. Packs Amusement Enterprises; records of Sam Broadhead; records of Hastings Cox.

As to Paragraph 3, plaintiff claims that the entries on lines 3, 4, 5, 7 and 8 of the tax returns of defendant for the years covered by the indictment (and all other figures and calculations used in other parts of the return in arriving at the figure or figures used on the above-mentioned numbered lines) are false.

[fol. 19] *As to Paragraph 4,* plaintiff states that all deductions against the claimed total gross income as shown on the returns are allowed in computing the alleged net income.

As to Paragraph 5, plaintiff states that it is not computing net income under Section 41 of the Internal Revenue Code.

CHARLES H. REHM,
Assistant United States Attorney.

[fol. 20] (Transcript of Testimony in Narrative Form.)

On March 15, 1954, a jury was empaneled and sworn and introduction of evidence commenced:

The plaintiff offered the following evidence:

E. M. FLINN testified as follows:

Direct Examination, by Mr. Rehm.

I am E. M. Flinn, assistant District Director of Internal Revenue for the St. Louis district which includes the City

of St. Louis. My duty is general conduct of the district office and I have charge and supervision of all records.

Plaintiff's Exhibit No. 1 is a form 1040 U. S. Individual Income Tax Return for the calendar year 1950, serial number 7411697, filed in the district office on March 15, 1951, and signed Paul Dillon. The return appears to have been made out on the basis of receipts and expenditures. There is a net income figure on Schedule C filed with form 1040. It shows net profit or loss before net operating loss deductions $1,526.11 (plaintiff's Exhibit No. 1 was offered and received in evidence without objection).

(Exhibit No. 1 is set out in full except for schedule showing travel expenses for 1950 and page 3 of the return which has nothing written on it.)

FORM 1040
U.S. Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN

1950
CALENDAR YEAR

For other taxable years ending after Sept. 30, 1950, but before Dec. 31, 1951, attach Form 1040FY

Do not write in these spaces

Serial No. 7411697

(Cashier's Stamp)

PLAINTIFF'S EX. #2

EMPLOYEES: Instead of this form, you may use Form 1040A if your total income was less than $5,000, consisting wholly of wages shown on Forms W-2, or of such wages and not more than $100 of other wages, dividends, and interest.

Name Paul Dillon
(PLEASE PRINT. If this is a joint return of husband and wife, use first names of both)

HOME ADDRESS 418 Olive Street
(PLEASE PRINT. Street and number or rural route)

St. Louis (City, town, or post office) 1 (Postal zone number) Mo. (State)

Social Security No. Occupation Lawyer

Your exemptions

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives (as defined in instructions) with 1950 gross incomes of less than $500 who received more than one-half of their support from you in 1950. If this is a joint return of husband and wife, list dependent relatives of both.

Name (please print)	Check below whether you (or your wife) were at the end of your taxable year— 65 OR OVER	BLIND	On lines a and b below— Write 1 if neither 65 nor blind; Write 2 if either 65 or blind; Write 3 if both 65 and blind.
Your name Paul Dillon	Yes ☒ No ☐	Yes ☐ No ☒	a. Number of exemptions for you 2
Wife's (or husband's) name	Yes ☐ No ☐	Yes ☐ No ☐	b. Number of her (his) exemptions
Name of Other Dependent Relative	Relationship		Address—If different from yours

Enter here total number of exemptions claimed (yours and your wife's plus one for each dependent listed above) ➡ 2

Your income

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1950, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Also enter amount of income tax withheld. Members of Armed Forces and persons claiming traveling or reimbursed expenses, see instructions.

Your Employer's Name	Where Employed (City and State)	Amount of Income Tax Withheld	Total Wages
		$	$
	Enter totals...	$	$

3. If you received dividends, interest, or any other income, give details on page 2 and enter the total here 1526 11

4. Add income shown in items 2 and 3, and enter the total here ..... $ 1526 11

How to figure the tax

IF YOUR INCOME WAS LESS THAN $5,000.—Use the table on page 4 to find your tax—unless you itemize deductions. This table allows about 10 percent of your total income for charitable contributions, interest, taxes, medical expenses, etc. If you itemize deductions and exceed 10 percent, it will usually be to your advantage to itemize deductions on page 3.

IF INCOME WAS $5,000 OR MORE.—Do not use tax table. Compute tax on page 3. Use standard deduction or itemize deductions, whichever is to your advantage.

HUSBAND AND WIFE.—For split-income benefits, file a joint return. If filing separate returns, and one itemizes deductions, both must itemize.

5. Enter your tax from table on page 4, or from line 18, page 3 ..... $ 32 00

Tax due or refund

6. How much income tax was withheld in 1950? (A) By employer(s) (see Copy B, above). Attach Original Forms W-2 $ 59 00
(B) By you on Declaration of Estimated Tax ..... Enter total here ➡ 59 00

7. If your tax (item 5) is larger than payments (item 6), enter BALANCE OF TAX DUE here ..... $
This balance of tax due must be paid in full with return.

8. If your payments (item 6) are larger than your tax (item 5), enter the OVERPAYMENT here ..... $ 27 00
Enter amount of item 8 you wish refunded to you $ 27.00 Credited on your 1951 estimated tax $ No
Do you owe any prior year Federal tax for which you have been billed? No (Yes or No)

If you filed a return for a prior year, state when and where filed 1949 St. Louis

To which Collector's office did you pay amounts claimed in item 6 (B)? St. Louis

County in which you reside St. Louis

Is your wife (or husband) making a separate return for 1950? No (Yes or No)

If "Yes," write her (or his) name

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person, other than taxpayer, preparing this return) (Date)

Paul Dillon (Signature of taxpayer) 3/22/51 (Date)

(Signature of taxpayer's wife or husband if this is a joint return) (Date)

To insure any benefits of split income, husband and wife should include all their income, and BOTH MUST SIGN, even though only one has income.

16—62001-1

Plaintiff's Exhibit 1.

17

SCHEDULE C (File with Form 1040)
U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

-950

SCHEDULE OF PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION

(Farmers should obtain Form 1040F)

For Calendar Year 1950 or other taxable years ending after Sept. 30, 1950, but before Dec. 31, 1951

NAME AND ADDRESS Paul Dillon

State (1) nature of business Lawyer

(2) business name

(3) business address 418 Olive Street, St. Louis, Missouri

Do NOT include in this schedule cost of goods withdrawn for personal use or deductions not connected with your business or profession

1. Total receipts from business or profession			$ 5073 66
COST OF GOODS SOLD			
2. Inventory at beginning of year	$		
3. Merchandise bought for manufacture or sale			
4. Cost of labor			
5. Material and supplies			
6. Other costs (explain in Schedule C-2)			
7. Total of lines 2 to 6	$		
8. Less inventory at end of year			
9. Net cost of goods sold (line 7 less line 8)			$ 5073 66
10. Gross profit (line 1 less line 9)			
OTHER BUSINESS DEDUCTIONS			
11. Salaries and wages not included in line 4	$		
12. Rent on business property	1200	00	
13. Interest on business indebtedness			
14. Taxes on business and business property			
15. Losses of business property (attach statement)			
16. Bad debts arising from sales or services			
17. Depreciation and obsolescence (explain in Schedule C-1)			
18. Repairs (explain in Schedule C-2)			
19. Depletion of mines, oil and gas wells, timber, etc. (submit schedule)			
20. Amortization of emergency facilities (attach statement)			1336 55 X 336 55
21. Other business expenses (explain in Schedule C-2)	2347	55	2347 55
22. Total of lines 11 to 21			3547 55
23. Net profit (or loss) before net operating loss deduction (line 10 less line 22)			$ 1526 11 X
24. Less net operating loss deduction (attach statement)			
25. Net profit (or loss). (Enter in Schedule C, page 2, Form 1040)			$

Schedule C-1. EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED ON LINE 17

1. Kind of property (If building, state material of which constructed)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Amount fully depreciated in year of end of year	5. Depreciation allowed (or allowable) in prior years	6. Depreciation and/or other basis to be recovered	7. Estimated life used to compute this year's depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
		$	$	$	$			$

Schedule C-2. EXPLANATION OF LINES 6, 18, AND 21

1. Line No.	2. Explanation	3. Amount	1. Line No.	Explanation	3. Amount
12	Rent & Office Exp.	$ 1200 00			$
21	Travel, Meals, Ldg. (see schedule)	2347 55			

10—42650-1

Plaintiff's Exhibit 1.

19

Schedule A.—INCOME FROM DIVIDENDS

Name and address of corporation declaring dividend	Amount	Name and address of corporation declaring dividend	Amount
	$		$
			Enter total here →

Schedule B.—INCOME FROM INTEREST

Name and address of payer	Amount	Name and address of payer	Amount
	$		$
			Enter total here →

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

Net profit (or loss) from business or profession (from separate Schedule C) 1526 11X

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D) .....
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D) .....

Schedule E.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in)	$	4. Total amount received this year	$
2. Amount received tax-free in prior years		5. Excess, if any, of line 4 over line 3	
3. Remainder of cost (line 1 less line 2)	$	6. Enter line 5, or 3 percent of line 1, whichever is greater (but do not enter more than line 4)	

Schedule F.—INCOME FROM RENTS AND ROYALTIES

1. Kind and location of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule H)	4. Repairs (explain in Schedule I)	5. Other expenses (itemize in Schedule I)
	$	$	$	$
1. Totals	$	$	$	$

2. Net profit (or loss) (column 2 less sum of columns 3, 4, and 5) .....

Schedule G.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

Plaintiff's Exhibit 1.

53711

21

2. Net profit (or loss) (column 2 less sum of columns 3, 4, and 5) .....

Schedule G.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

NAME	ADDRESS	AMOUNT
1. Partnership, joint venture, etc		$
2. Estate or trust		
3. Other sources (state nature)		
	Enter total here ➡	

Total income (or loss) from above sources (Enter as item 3, page 1) ..... $

Schedule H.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULE F

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
		$	$	$	$			$

Schedule I.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE F

1. Column No.	2. Explanation	3. Amount	1. Column No.	2. Explanation	3. Amount
		$			$

☆ GPO 16—82161-1

[fol. 21] Line 1 of Schedule C shows total receipts from business or profession as $5,073.66. Line 4 of page 1 shows an adjusted gross income in the amount of $1,526.11. Line 5 shows an income tax due in the amount of $32.00.

Plaintiff's Exhibit No. 2 is a form 1040 United States Individual Income Tax Return for the calendar year 1951, serial No. AF14679, filed in the St. Louis District office on March 17, 1952, and signed Paul Dillon. (Plaintiff's Exhibit No. 2 was offered and received in evidence without objection.)

(Exhibit No. 2 is set out in full except for schedule showing traveling expenses.)

Plaintiff's Exhibit 2.

23

Form 1040 (1951)
U.S. Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN

FOR CALENDAR YEAR 1951

1951

Do not write in these spaces

Serial No.

(Cashier's Stamp)

AF 14679

or taxable year beginning ....., 195..., and ending ....., 195...

Name Paul Dillon
(PLEASE PRINT. If this is a joint return of husband and wife, use first names of both)

HOME ADDRESS 418 Olive St
(PLEASE PRINT. Street and number or rural route)

St Louis Mo
(City, town, or post office) (Postal zone number) (State)

Social Security No. ..... Occupation Lawyer

Check below if at the end of your taxable year you or your wife were—

65 or over [X] Blind [ ]

65 or over [ ] Blind [ ]

Lines A and B below—
If neither 65 nor blind write the figure 1
If either 65 or blind write the figure 2
If both 65 and blind write the figure 3

Number of exemptions for you 2

Number of her (or his) exemptions .....

Name and address if different from yours

Your exemptions

1. List your name. If your wife (or husband) had no income, or if this is a joint return, list also her (or his) name.

A Paul Dillon
(Your name)

B .....
(Your wife's name—do not list if exemption is claimed on another return)

C. List names of your children (including stepchildren and *legally* adopted children) with 1951 gross incomes of less than $600 who received more than one-half of their support from you in 1951. See Instructions.

Enter number of children listed 1

D. Enter number of exemptions claimed for close relatives listed in Schedule J on page 2 2

E. Enter total number of exemptions claimed in A to D above 3

Your income

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1951, *before payroll deductions.* Persons claiming traveling or reimbursed expenses, see Instructions.

Print Employer's Name	Where Employed (City and State)	Income Tax Withheld	Total Wages
		$	$
	Enter totals	$	$ 89 12

3. If you received dividends, interest, or any other income, give details on page 2 and enter the total here ..... $ 89 12

4. Add income shown in items 2 and 3, and enter the total here ..... $ 89 12

How to figure the tax

IF YOUR INCOME WAS LESS THAN $5,000.—Use the tax table on page 4 *unless you itemize deductions.* The table allows about 10 percent of your income for charitable contributions, interest, taxes, medical expenses, etc. If your deductions exceed 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.

IF INCOME WAS $5,000 OR MORE.—Compute tax on page 3. Use standard deduction or itemize deductions, whichever is to your advantage. C.Y. # 1333109

Tax due or refund

5. (A) Enter your tax from table on page 4, or from line 13, page 3 ..... $ 164 87
(B) Enter your self-employment tax from line 31, separate Schedule C ..... Enter total here → $ 164 87

6. How much have you paid on your 1951 income tax?
(A) By tax withheld (in item 2, above). Attach Original Forms W-2 ..... $
(B) By payments on 1951 Declaration of Estimated Tax (include any overpayment on your 1950 tax not claimed as a refund) ..... 100 —
Enter total here → 100 —

7. If your tax (item 5) is larger than payments (item 6), enter *balance of tax due* here. The balance must be paid in full with return ..... $ 64 87

8. If your payments (item 6) are larger than your tax (item 5), enter the *overpayment* here ..... $
Enter amount of item 8 you want (Refunded) (Credited on 1952 estimated tax)

MAR 1952

Do you owe any prior year Federal [illegible] which you have been billed? (Yes or No) No Was your wife (or husband) making a separate return for 1951? (Yes or No) No If "yes," write her (or his) name .....

If you have filed a return for any prior year, state such year 1950 Where filed? St Louis

To which Collector's office did you pay the amount claimed in item 6 (B), above? .....

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person, other than taxpayer, preparing this return) (Date)

Paul Dillon
(Signature of taxpayer) (Date) 3/14/52

(Signature of husband if this is a joint return) (Date)

To assure that husband and wife have included all their income and, even though only one has income, BOTH MUST SIGN. 16—61001-1

Schedule A.—INCOME FROM DIVIDENDS

Name of corporation making dividend	Amount	Name of corporation making dividend	Amount
Stevens Creek Service	1000 00		
			Enter total here → $ 1000 00

Schedule B.—INCOME FROM INTEREST

Name of payer	Amount	Name of payer	Amount
			Enter total here →

Schedule C Summary.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION, FARMING, AND PARTNERSHIP

1. Business profit (or loss) from separate Schedule C, line 24	$ 7914 34	
2. Farm profit (or loss) from separate schedule, Form 1040F		
3. Partnership, etc., profit (or loss) from Form 1065, Schedule J, Column 10		
4. Total of lines 1, 2, 3	$	
5. Less: Net operating loss deduction (attach statement)		
6. Net profit (or loss) (line 4 less line 5)		7914 34

Schedule D.—NET GAIN OR LOSS FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. From sale or exchange of capital assets (from separate Schedule D)
2. From sale or exchange of property other than capital assets (from separate Schedule D)

Schedule E.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (amount you paid)	$	4. Amount received this year	$
2. Cost received tax-free in past years		5. Excess of line 4 over line 3	
3. Remainder of cost (line 1 less line 2)	$	6. Enter line 5, or 3 percent of line 1, whichever is greater (but not more than line 4)	

Schedule F.—INCOME FROM RENTS AND ROYALTIES

1. Kind and location of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule H)	4. Repairs (explain in Schedule I)	5. Other expenses (explain in Schedule I)
	$	$	$	$
1. Totals	$	$	$	$

2. Net profit (or loss) (column 2 less sum of columns 3, 4, and 5)

Schedule G.—INCOME FROM ESTATES AND TRUSTS AND OTHER SOURCES

1. Estate or trust (Name)	Gambling Losses 500 00	$
2. Other sources (state nature)	Interest Income 410 00	0000
	Enter total here →	64
Total income (or loss) from above sources (Enter here and as item 3, page 1)		$ 8914 34

Schedule H.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SEPARATE SCHEDULE C AND SCHEDULE F

1. Kind of property (If buildings, state material of which constructed. Exclude land and other nondepreciable property)	2. Date acquired	3. Cost or other basis	4. Depreciation allowed or allowable in prior years	5. Remaining cost or other basis to be recovered	6. Life used in computing depreciation	7. Deduction this year, beginning of year	8. Depreciation allowable this year
		$	$	$			$

Schedule I.—EXPLANATION OF LINES 6, 17, AND 28, SEPARATE SCHEDULE C AND COLUMNS 4 AND 5 OF SCHEDULE F

Line or Column No.	Explanation	Amount	Line or Column No.	Explanation	Amount
		$			$

Schedule J.—EXEMPTIONS FOR CLOSE RELATIVES.—(See Instructions)

1. Name of dependent relative. Also give address of different from yours	2. Relationship	3. Did dependent during 1951 (a) Have gross income of $600 or more?	(b) Receive in your home?	(c) Receive entire support from you?	4. If answer to either 3(b) or 3(c) is "No" enter amount spent for dependent's support in 1951 by— You (and your wife if this is a joint return)	Others, and by dependent from own funds
					$	$

Enter here and as item 11D, page 1, the number of close relatives claimed above

SCHEDULE C (File with Form 1040)
U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

1951

SCHEDULE OF PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION AND COMPUTATION OF SELF-EMPLOYMENT TAX (for old-age and survivors insurance)

For calendar year 1951 or fiscal year beginning ....., 1951, and ending ....., 195....

Name and address under which Form 1040 is filed Paul Dillon

If a joint return, name of husband or wife having net earnings from self-employment .....

PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION
(For reporting farm income, see Form 1040 Instructions)

State (1) nature of business Lawyer
(2) business name .....
(3) business address .....

Do NOT include in this schedule cost of goods withdrawn for personal use or deductions not connected with your business or profession

1. Total receipts from business or profession				$ 3[illegible] 00
COST OF GOODS SOLD				
2. Inventory at beginning of year		$		
3. Merchandise bought for manufacture or sale				
4. Cost of labor Lawyer The Challe			75 00	
5. Material and supplies				
6. Other costs (explain in Schedule I, Form 1040)				
7. Total of lines 2 to 6		$		
8. Less inventory at end of year				75 00
9. Net cost of goods sold (line 7 less line 8)				$ 12[illegible]70 00
10. Gross profit (line 1 less line 9)				
OTHER BUSINESS DEDUCTIONS				
11. Salaries and wages not included in line 4 Office expenses		$	173 58	
12. Rent on business property				
13. Interest on business indebtedness Travel			2803 40	
14. Taxes on business and business property				
15. Bad debts arising from sales or services				
16. Depreciation and obsolescence (explain in Schedule H, Form 1040)				
17. Repairs (explain in Schedule I, Form 1040)				
18. Depletion of mines, oil and gas wells, timber, etc. (submit schedule)				
19. Amortization of emergency facilities (attach statement) Auto Expense			878 66	
20. Other business expenses (explain in Schedule I, Form 1040)				
21. Total of lines 11 to 20				$ 3[illegible]55 64
22. Net profit (or loss) before losses of business property (line 10 less line 21)				$ 791[illegible]36
23. Less: Losses of business property (attach statement)				
24. Net profit (or loss) (line 22 less line 23). Enter here and on line 1, Schedule C Summary, page 2, Form 1040				$

COMPUTATION OF SELF-EMPLOYMENT TAX (See Instructions on other side)

25. Net earnings (or loss) from self-employment included in line 22, above	$	
26. Net earnings (or loss) from self-employment from partnerships, joint ventures, etc. (from column 10, Schedule K, page 4, Form 1065)		
27. Total net earnings (or loss) from self-employment (lines 25 and 26) (If total of net earnings is under $400, do not make any entries below)		$
28. Wages paid to you during the taxable year which were subject to withholding for old-age and survivors insurance		None
29. Total of lines 27 and 28		
30. Self-employment income subject to tax: If line 29 is (a) *not over* $3,600, enter amount shown on line 27. (b) *over* $3,600, enter amount equal to excess of $3,600 over wages shown on line 28. If amount on line 28 is $3,600 or more, enter "none"		$
31. Self-employment tax—2¼ percent of amount shown on line 30. Enter tax here and as item 5(B), page 1, Form 1040		$

FILL IN ITEMS BELOW BUT DO NOT DETACH

Plaintiff's Exhibit 2.

27

ITEMIZED DEDUCTIONS—FOR PERSONS NOT USING TAX TABLE ON PAGE 4 OR STANDARD DEDUCTION ON LINE 2 BELOW—
If Husband and Wife (Not Legally Separated) File Separate Returns and One Itemizes Deductions, the Other Must Also Itemize

Contributions		$	
	Allowable Contributions (not in excess of 15 percent of item 4, page 1)		$
Interest		$	
	Total Interest		
Taxes		$	
	Total Taxes		
Losses from fire, storm, or other casualty, or theft		$	
	Total Allowable Losses (not compensated by insurance or otherwise)		
Medical and dental expenses (if over 65 see instructions)		$	
	Net Expenses (not compensated by insurance or otherwise)	$	
	Enter 5 percent of item 4, page 1, and subtract from Net Expenses. Allowable Medical and Dental Expenses. See Instructions for limitation		
Miscellaneous (See Instructions)		$	
	Total Miscellaneous Deductions		
	Total Deductions		$

TAX COMPUTATION FOR CALENDAR YEAR 1951 (For Other Taxable Years Attach Form 1040PT)

1. Enter amount shown in item 4, page 1. This is your Adjusted Gross Income		$ 891 42 ✓
2. If deductions are itemized above, enter total of such deductions. If deductions are not itemized *and line 1, above, is $5,000 or more:* (*a*) married persons filing separately enter $500, (*b*) all others enter 10 percent of line 1, but not more than $1,000		891 42 ✓
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income		$ 5022 91
4. Multiply $600 by total number of exemptions claimed in item 1E, page 1. Enter total here		1200 00 ✓
5. Subtract line 4 from line 3. Enter difference here. (If line 1 includes partially tax-exempt interest, see instructions)		$ 3822 91 ✓
6. If line 5 is not more than $2,000—Enter 20.4 percent of amount on line 5 and disregard lines 7, 8, and 9. This is your normal tax and surtax		$ 1649 87 ✓
7. If line 5 is more than $2,000 and you are a single person or a married person filing separately—Use tax rates on last page of instructions to figure tax on amount on line 5. This is your normal tax and surtax		$
8. If line 5 is more than $2,000 and you are filing a joint return—	$	
(*a*) Enter here one-half of the amount of line 5		
(*b*) Use tax rates on last page of instructions to figure tax on amount on line 8 (*a*)		
(*c*) Multiply amount on line 8 (*b*) by 2. This is your normal tax and surtax		$
9. If alternative tax computation is made, enter here tax on back of separate Schedule D		$
Disregard lines 10, 11, and 12, and copy on line 13 the same figure you entered on line 6, 7, 8 (*c*), or 9, unless you used itemized deductions		
10. Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116)	$	
11. Enter here any income tax paid at source on tax-free covenant bond interest		$
12. Add the figures on lines 10 and 11 and enter the total here		
13. Subtract line 12 from line 6, 7, 8 (*c*), or 9. Enter difference here and as item 5 (A), page 1. This is your tax		$

16—60504-4

Plaintiff's Exhibit 2.

[fol. 22] Line 1 of Schedule C shows total receipts from business or profession in the amount of $13,495.00. Line 22 of Schedule C shows net profit in the amount of $7,914.36. The amount of income tax shown as due and owing in the return entered on line 5 of page 1 is in the amount of $1,642.87.

Exhibit No. 3 is form 899, a certificate of assessments and payments in the name of Paul Dillon. It was prepared in my office by the accounting division under my control and supervision. (Exhibit No. 3 was offered and received in evidence without objection.)

[fol. 23] Cross Examination by Mr. Shenker.

Plaintiff's Exhibit No. 3 shows that Mr. Dillon paid taxes for 1950 in the amount of $1,743.66 and paid taxes for 1951 in the amount of $5,997.28.

Re-Direct Examination by Mr. Rehm.

For the year 1950, $59.00 was paid with an estimated tax return. And also for 1950 an additional tax of $958.21, interest of $88.91, and a penalty of $637.54, totalling $1,684.66 were paid.

CLAUDE HOEBER, JR., testified as follows:

Direct Examination by Mr. Rehm.

My name is Claude Hoeber, Jr. I am general manager of Thomas N. Packs Amusements. I have worked in that capacity since 1946 and I am Mr. Packs' brother-in-law. As general manager I have custody and control of the records of Thomas N. Packs Enterprises. Plaintiff's Exhibits Nos. 4, 5, 6, 7, 8, 9 and 10 are checks drawn on Thomas N. Packs Amusement Enterprises and signed by Mr. Packs. Mr. Packs' signature is on all these exhibits.

Q. Can you testify of your own knowledge whether any money was paid by Thomas N. Packs and Thomas N. Packs Amusement Enterprises, amounts here represented by these checks, which are Government's Exhibits 4 to 10, sir? A. None that I know of.

The Court: Paid to whom?

Mr. Rehm: Payable to whoever—paid to Mr. Dillon.

A. No, not that I know of.

Q. I show you Exhibits 5 and 6, sir, and ask you if you can tell whether those checks were delivered or mailed to Mr. Dillon?

A. They were, most probably in the normal course of business would have been mailed to him on the day they were written.

Q. And what time of day would they have been mailed, sir?

Mr. Shenker: I am going to object to just testifying the usual course; if he knows, of course, he can testify what he knows, but not if he is merely basing it on conjecture.

[fol. 24] The Court: Overruled.

Q. What time does Mr. Packs come to the office, sir?

A. Oh, sometimes, usually between 10:30 and 11:00 in the morning.

Q. The checks would have been mailed after that time?

Mr. Shenker: I will object to that, if the Court please; it calls for a conclusion, and, of course, is leading and suggestive.

The Court: Overruled.

Plaintiff's Exhibit No. 11 is a Mercantile Commerce Bank and Trust Company pass book, Thomas N. Packs Amusements.

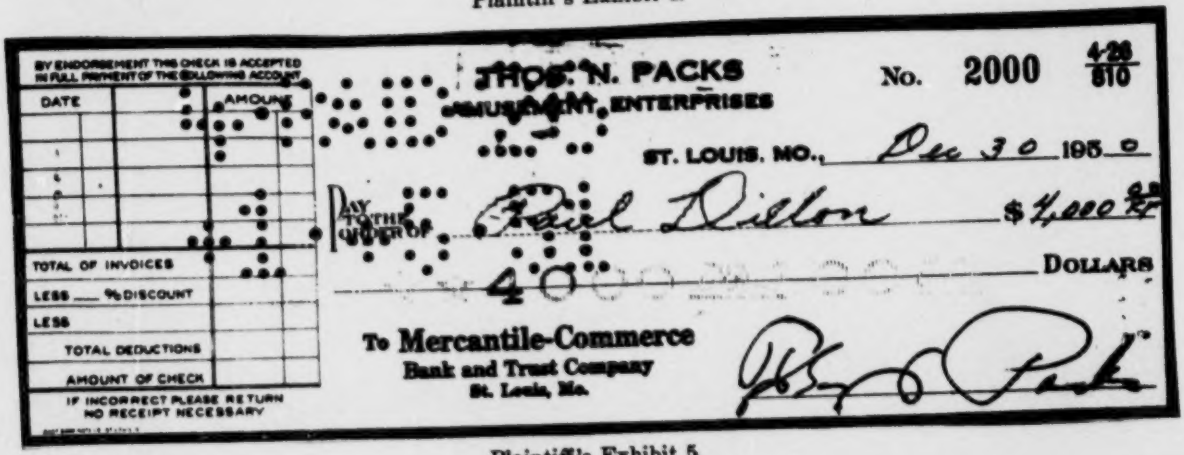
Cross Examination by Mr. Shenker.

I had no business dealings with Mr. Dillon. All I am doing is identifying certain records of my company.

Questions by the Court.

All these checks have been drawn on the Packs Company and have been in their records. They went through and were cashed.

Plaintiff's Exhibit 4.



Plaintiff's Exhibit 5.

BY ENDORSEMENT THIS CHECK IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

DATE | AMOUNT

TOTAL OF INVOICES
LESS ___ % DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

IF INCORRECT PLEASE RETURN NO RECEIPT NECESSARY

THOS. N. PACKS
AMUSEMENT ENTERPRISES

No. 2001 4-26 810

ST. LOUIS, MO., Dec 30 1950

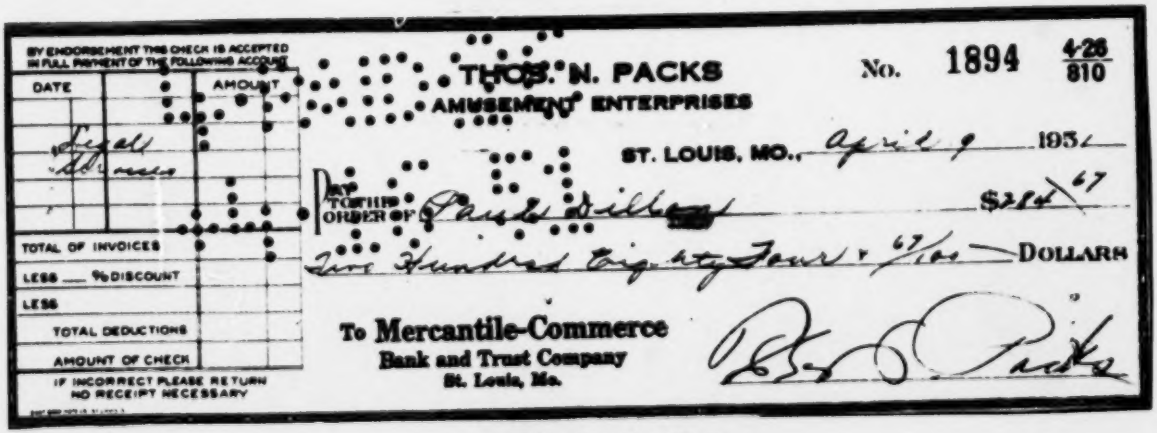
PAY TO THE ORDER OF Gareth Dillon $500 42/7

DOLLARS

To Mercantile-Commerce Bank and Trust Company St. Louis, Mo.

Thos. N. Packs

Plaintiff's Exhibit 6.


BY ENDORSEMENT THIS CHECK IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

DATE | AMOUNT

Legal Advice

TOTAL OF INVOICES
LESS ___ % DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

IF INCORRECT PLEASE RETURN NO RECEIPT NECESSARY

THOS. N. PACKS
AMUSEMENT ENTERPRISES

No. 1894 4-26 810

ST. LOUIS, MO., April 9 1951

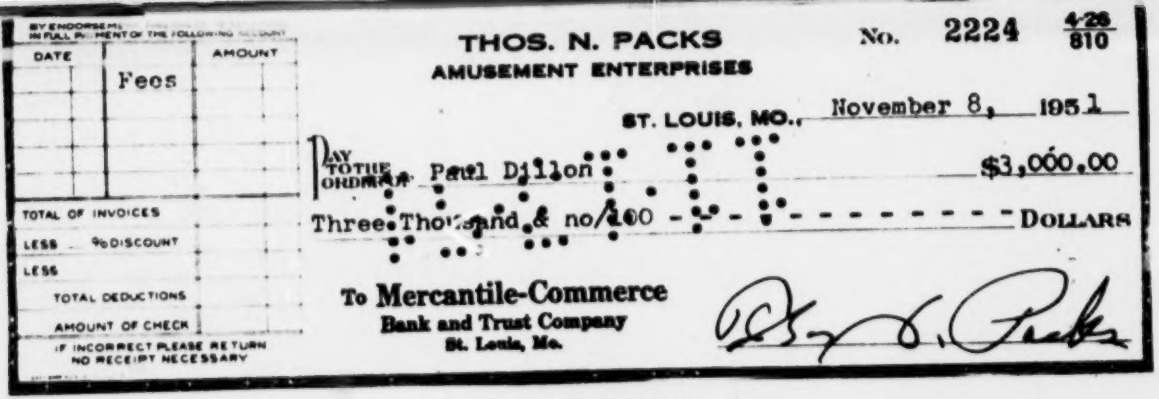
PAY TO THE ORDER OF Paula Dillon $284 67

Two Hundred Eighty Four & 67/100 DOLLARS

To Mercantile-Commerce Bank and Trust Company St. Louis, Mo.

Thos. N. Packs

Plaintiff's Exhibit 7.



BY ENDORSEMENT IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

DATE		AMOUNT
	Fees	

TOTAL OF INVOICES
LESS ___ % DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

IF INCORRECT PLEASE RETURN
NO RECEIPT NECESSARY

THOS. N. PACKS
AMUSEMENT ENTERPRISES

No. 2224 4-26 810

ST. LOUIS, MO., November 8, 1951

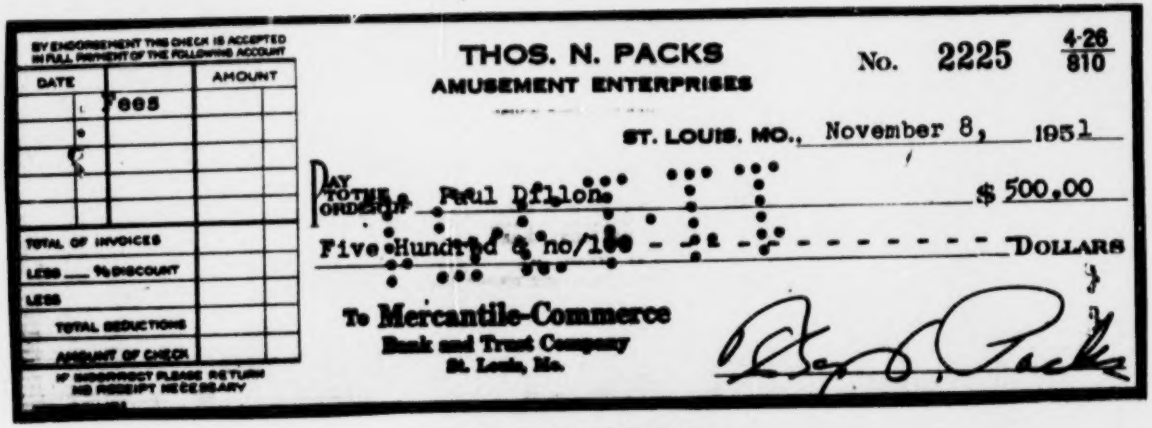
PAY TO THE ORDER OF Paul Dillon $3,000.00

Three Thousand & no/100 - - - - - - - - - - DOLLARS

To Mercantile-Commerce
Bank and Trust Company
St. Louis, Mo.

Thos. N. Packs

Plaintiff's Exhibit 8.



BY ENDORSEMENT THIS CHECK IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

DATE		AMOUNT
	Fees	

TOTAL OF INVOICES
LESS ___ % DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

IF INCORRECT PLEASE RETURN
NO RECEIPT NECESSARY

THOS. N. PACKS
AMUSEMENT ENTERPRISES

No. 2225 4-26 810

ST. LOUIS, MO., November 8, 1951

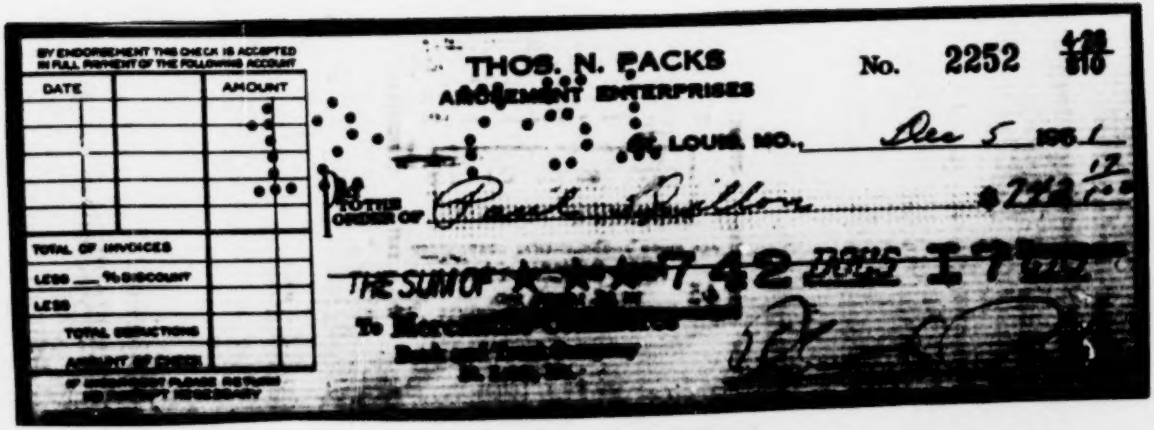
PAY TO THE ORDER OF Paul Dillon $ 500.00

Five Hundred & no/100 - - - - - - - - - - DOLLARS

To Mercantile-Commerce
Bank and Trust Company
St. Louis, Mo.

Thos. N. Packs

Plaintiff's Exhibit 9.



Plaintiff's Exhibit 10.

[fol. 27] (Exhibits 4, 5, 6, 7, 8, 9, and 10 all have the endorsement, Paul Dillon, on their backs.)

[fol. 28] SAM BROADHEAD testified as follows:

Direct Examination, by Mr. Rehm.

My name is Sam Broadhead and I live in Meridian, Mississippi. I have lived there for ten years. I was in the lumber business.

I know the defendant Paul Dillon. I had some dealings with the defendant in 1949, 1950 and 1951. He represented me as attorney in some matters.

Exhibit No. 12 is a check in the amount of $1,250.00 payable to Mr. Dillon. That check was given to Mr. Dillon for services to me as an attorney.

Exhibit No. 13 is a record that was made at the time I paid Mr. Dillon $2,000.00 in cash. I paid the money in cash.

Q. At whose request, sir?

A. Well, Mr. Dillon usually wanted money that way, payments, and when it was convenient, where we could, [fol. 29] we got him the money, because—(the witness pauses).

The memorandum was made at the time Mr. Dillon was paid this $2,000.00, about March 20, 1950.

Questions by the Court.

It was paid about March 20, 1950. A check for $1,250.00 was delivered to the defendant on June 22, 1950. I got the check back from the bank. It was paid.

[fol. 30] (Exhibit 12 is a check dated June 22, 1950, in the amount of $1,250.00, payable to Paul Dillon, and signed by Sam Broadhead. It is endorsed on its back, Paul Dillon.)

[fol. 31] (Exhibit 13 is a sheet of yellow paper with various names and amounts. The first two items follow:

20 Paul Dillon Legal 2,000.00

20 Fine—2,000.00—1,000.00 already up for bond ..... 1,000.00)

[fol. 32] Cross-Examination, by Mr. Shenker.

I employed Mr. Dillon to do some work, and I paid him some money. Exhibit No. 13 is not in my handwriting. It was done in my office. The girl kept this down. Every day I paid money she wrote it down. That money was paid to Mr. Dillon in Mississippi over at the Lamar Hotel within 24 hours of March 20th. The exhibit does not show the month of March anywhere.

Q. All right. Now, I will ask you, sir, to state if, in addition to Mr. Dillon, there was associate counsel in that case, from Mississippi. A. They were.

Q. Was it Mr. Mize? A. Mr. Frank Mize.

Q. Mr. Frank Mize. And is it or isn't it a fact that your understanding with Mr. Dillon was that he is to pay with part of the money that you paid him to Mr. Mize?

A. I don't know anything what the dealings between Mr. Dillon and Mr. Mize, but Mr. Mize was with me at every meeting we had and Mr. Dillon was present.

Q. But you knew Mr. Mize was going to be paid, isn't that right, sir? A. Yes, I knew Mr. Mize was, that is right.

Q. Well, he is a lawyer, isn't he? A. Yes.

Q. And when you appeared in court, did Mr. Mize [fol. 33] appear with you, sir? A. He did.

Q. Mr. Mize appeared with you and represented you?

A. That is right.

Q. All right. Now, didn't you understand, and wasn't that discussed with you, that Mr. Dillon was to give a portion of the money that he got from you to Mr. Mize?

A. No, there wasn't no discussion between me and Mr. Dillon, what he was going to give to Mr. Mize.

Q. I see, there was no discussion about that?

A. None whatever.

Q. Excepting you knew that Mr. Dillon was going to pay Mr. Mize? A. Well, Mr. Dillon wanted to employ him.

Q. Well, that is what I say, Mr. Dillon wanted to employ him? A. Yes.

Q. So it was up to him to pay him, is that right? Mr. Mize represented you and went to court, isn't that correct, sir? A. Mr. Mize went to court each time we met.

Q. That is correct, each time it was necessary for you to go to court, Mr. Mize went to court with you?

A. That is right.

Mr. Shenker: All right. That is all.

Redirect Examination, by Mr. Rehm.

Q. All payments that you made to Mr. Dillon were made to him direct, is that right, sir? A. That is right.

Q. And you did pay Mr. Mize some money, didn't you, sir?

A. I paid Mr. Mize, but it was not pertaining to this.

The Court: What? Say that again.

A. I paid Mr. Mize for some work, but it was not nothing in connection with this. Altogether different.

Q. But Mr. Mize had been representing you in another matter? A. Yes.

Q. And you paid him? A. Uh-huh.

[fol. 34] Mr. Rehm: That is all.

Recross Examination, by Mr. Shenker.

Q. In other words, in that other matter, as I understand, that is the matter in which Mr. Mize did the work with Mr. Dillon, you paid Mr. Mize nothing, isn't that correct?

A. Yes, I paid him nothing for that.

Q. That is right. In other words, what you paid Mr. Mize is on some other legal services?

A. Absolutely. The other services.

Q. I see. And you did know that Mr. Mize was going to be paid for the work, but it was up to Mr. Dillon to pay it, isn't that correct, sir?

A. It was up to Mr. Dillon to settle with Mr. Mize.

Q. I see. And Mr. Mize never asked you nor received any money from you for that service, is that right?

A. At no time.

Mr. Shenker: At no time. That is all. Thank you.

HENRY O'DOM testified as follows:

Direct Examination, by Mr. Rehm.

I am Henry O'Dom of Meridian, Mississippi. I know the defendant Mr. Dillon. He was employed by Mr. Broadhead in a law suit to defend it. I am an employee and former partner of Mr. Broadhead. I was an employee at the time Mr. Dillon was employed. The mills that we had—two—at that time had been sold. I am familiar with payments made by Mr. Broadhead to Mr. Dillon in regard to those services. I have a recollection of Mr. Broadhead paying Mr. Dillon $2,000.00. I think that it was the 20th of March. I wouldn't say the date. It was during the term of federal court in Meridian and that was the day that Mr. Broadhead was fined $1,000.00, fined $2,000.00 and he had up a thousand dollars in cash bond and Mr. Dillon wanted $2,000.00 on that date, and after Mr. Broadhead was fined, he asked me to go to the bank and get $3,000.00, which I did. I paid the Court the $1,000.00 and went on over to the hotel and gave Mr. Dillon the $2,000.00. I saw the money given to Mr. Dillon.

[fol. 35] Cross Examination, by Mr. Shenker.

I don't know anything about the contract of what Mr. Broadhead was to pay to Mr. Dillon or anything, but I was present when various sums were paid. Mr. Mize was in Court but Mr. Mize wasn't over at the hotel the day that we paid Mr. Dillon the money. Mr. Mize was not present at the time the $2,000.00 was paid to Mr. Dillon.

Q. Was Mr. Mize representing Mr. Broadhead in that case in federal court?

A. I don't know whether Mr. Mize was present in Court, but Mr.—we had no dealings with Mr. Mize. How Mr. Mize was associated in this case, I don't know, unless it was through Mr. Dillon. It was not through the defendant.

Any consultation with Mr. Mize was through Mr. Dillon. I know of my own knowledge that Mr. Broadhead paid no money to Mr. Mize for this case in my presence. I wouldn't say for sure he didn't, but I knew he never paid Mize in my presence.

HENRY SANDER testified as follows:

Direct Examination, by Mr. Rehm.

My name is Henry Sander. I am assistant superintendent of the Post Office in St. Louis, Missouri. I have been so engaged since 1952. Before that I was supervisor on the street, so to speak, or foreman for 18 years. I am acquainted with the mail delivery in the City of St. Louis. It was part of my job in making delivery routes to keep them working proper as best we can.

Q. I will ask you, sir, if a letter mailed after 10:30 from 812 Olive Street, in St. Louis, to 418 Olive Street, in St. Louis, after 10:30 on Saturday, December 30, 1950, what is the earliest time that that letter would be received at 418 Olive Street, if you know?

Mr. Shenker: Just a minute. I am going to object to that question, if it please the Court, on the ground it is totally immaterial, irrelevant and incompetent on any of the issues in this case, does not tend to prove or disprove any of the issues in this case, and no foundation is laid for any such question.

[fol. 36] The Court: Overruled. • • •

A. It couldn't possibly be delivered until 9:30 on Tuesday, January 2.

Cross Examination, by Mr. Shenker.

That was not under my supervision in 1950. I do know, because I made investigation, and made reports on it. We have all those records on this list.

Q. And you testified, not from your own knowledge, but what you found out after you were subpoenaed, is that right?

A. Well, naturally, when I knew what it was all about.

Q. You mean where did you know it was all about.

A. Well, I was told it was regarding the earliest possible time for a delivery of a piece of mail deposited at a certain point at 10:30 on December 30, previous, I mean to 10:30 a. m.

If it was special delivery letter, it would be delivered sooner that that, but I was speaking of first class mail.

A special delivery letter mailed on December 30 would be delivered on the same day providing the office it was going to was open. If the name is on the door the office doesn't have to be open. It is just left there. The only time the office would have to be open is if it was mailed registered, special delivery. Otherwise they would just leave it.

CARL WALLACE testified as follows:

Direct Examination, by Mr. Rehm.

I am Carl Wallace, an internal revenue agent. I have been so employed for the last 4 and ½ years or since about 1949. I hold a bachelor of commercial science degree which I received in June, 1947 and I also took some post-graduate work at Washington University. I know the defendant Paul Dillon. His income tax returns were assigned to me for routine investigation. By routine investigation I mean I was just to examine his returns and make a report on whether or not his correct income had been reported, in other words, to determine civil tax liability. The first meeting that I had with Mr. Dillon was at his office on February 6, 1952, when I started the investigation. Mr. Dillon was not under arrest and was not charged [fol. 37] with any offense at that time. He was not threatened with any prosecution nor was he otherwise coerced in any manner.

At that time Mr. Dillon made available to me two small black account books where he kept account of his income and the other reported his expenses. He also produced some canceled checks. Exhibit No. 14 which I have seen before is a photostatic copy of a page in Mr. Dillon's register of his income. The original and photostatic copy were compared by me and the original was returned to Mr. Dillon.

(Mr. Shenker produces some original books.)

That covers 1950.

Exhibits Nos. 15 and 16 are a record of income. This covers the recorded figure Dillon gives of his income for

the year 1951. Exhibit 16 covers his 1951 and Exhibit 14 covers the year 1950. I have compared Exhibits 15 and 16. They are exact duplicates.

I have seen Mr. Dillon sign his name and I am familiar with his signature. The endorsement on the back of Government's Exhibits Nos. 4 to 10 appears to be the same signature which I have seen Mr. Dillon make on another document. Exhibit 12 also appears to be the same signature which I have seen on another document.

Mr. Rehm: Your Honor, at this time plaintiff would like to offer in evidence Exhibits * * * 4 to 10, and from 12 to 16, sir.

Mr. Shenker: So far as Exhibits 4, 5, 6, 7, 8, 9 and 10, if the Court please, we are going to object to their introduction for the reason that they are totally incompetent, irrelevant and immaterial to the points at issue in this case, that there has been no sufficient identification and no foundation laid for their introduction. We are not objecting to the introduction of Exhibit No. 12, if the Court please. That is the exhibit which was identified by Mr. Broadhead. We are objecting to those other exhibits; we submit there has been no foundation laid for their introduction, they are hearsay, don't tend to prove or disprove any of the allegations in this indictment.

The Court: Don't you expect to show what those checks were delivered for—4 to 10?

Mr. Rehm: They already show on their face.

Mr. Shenker: They do not show that.

[fol. 38] Mr. Rehm: They all show——

Mr. Shenker: No, they don't.

(Mr. Rehm hands the exhibits to the Court.)

The Court: I will admit them.

Mr. Rehm: How about the other?

The Court: Exhibit No. 12 is admitted. Exhibit No. 13 is admitted, 14, 15 and 16 admitted * * *.

Plaintiff's Exhibit 14.

Fidelity Bonds for Railroad Employees

THURSDAY, MARCH 9

Jany 1950 ooo
ooo

Feby 1950
Wayne Dilt 2640 ae
Engineering 2640

FRIDAY, MARCH 10

March 1950
Broadhead 1000
1000

April
Troy

SATURDAY, MARCH 11

June 1950
Brookhead 1250 ~

July —
August —
Sept 7th 1950 100
Goldsmith

Nov 8th 83.66
1/2 Due from
and Waterhall
& Hennigan

SUNDAY, MARCH 12

Dec 1950

—

Plaintiff's Exhibit 15.

Bonds for Fiduciaries

MONDAY, MARCH 13

Jany 1951

Packs Master 1500 —

Dollmann 5000

6500

TUESDAY, MARCH 14

Feby 1950

Cod fee 1000.

1000

March 51

Cal fee 100.

Mutual Income dividend 250.

350

Bonds in Court Proceedings

WEDNESDAY, MARCH 15

April 51
Tom Sachs fee 284.67
Clarence Hood 1200.00
1484.67

May 51
Siegle estate 117.12
117.2

THURSDAY, MARCH 16

[illegible] 5' Schneider Estate 454.13
454.13

July 20th
F. Louis Bruhn $ 1240.00

Aug 30th 1951
Legislation 100.

Plaintiff's Exhibit 16.

Bonds Required for Last Securities

FRIDAY, MARCH 17

Left
Old
Fox Farb 1500

SATURDAY, MARCH 18

[fol. 39] Mr. Rehm: They all show——

Mr. Shenker: No, they don't.

(Mr. Rehm hands the exhibits to the Court.)

The Court: I will admit them.

Mr. Rehm: How about the other?

The Court: Exhibit No. 12 is admitted. Exhibit No. 13 as admitted, 14, 15 and 16 admitted * * *

Exhibit 14 is the cash receipts book of the defendant, Paul Dillon, for the year 1950. I made a total of the entries on that page. The total amounted to $5,073.66.

I made a total of the figures in Plaintiff's Exhibits Nos. 15 and 16, the photostatic copy of the cash receipts journal of the defendant. It came to $12,495.92.

The check marked Plaintiff's Exhibit No. 4 is not recorded in the book marked Exhibit No. 14. The receipt of the check is not recorded in the book.

Q. I will show you Plaintiff's Exhibit No. 13 and ask you—the first line, March 20, 1950—and ask you if that receipt is recorded any place in that book.

Mr. Shenker: Going to object to that, if the Court please, on the ground it is an invasion of the province of the jury, calls for a conclusion and opinion and comparison of documents.

The Court: Overruled.

A. March, 1950, there is a $1,000.00 item in the cash receipts book.

Q. All right, sir. I will show you what has been marked Plaintiff's Exhibits Nos. 5 and 6 and ask you if they are reported or recorded in Plaintiff's Exhibit No. 15.

Mr. Shenker: I am going to object to this question, if the Court please, on the ground that there is no showing here on the face of this instrument as to what this money or the amounts shown represented by these checks were, and that their asking this witness would be totally irrelevant, incompetent and immaterial to the points at issue in this case, that there is no showing as to what these amounts represented by these exhibits are supposed to be for.

[fol. 40] The Court: Overruled . . .

Exhibit No. 13, which shows the amount $2,000.00, is listed on Plaintiff's Exhibit 14 as $1,000.00. The total amount of Exhibits 5 and 6 are not recorded on Exhibit No. 15.

Q. How is it entered, sir?

Mr. Shenker: I am going to object to that, if the Court please.

* * * * * * *

Q. Just tell the Court and the jury how Exhibits 5 and 6 are entered in Exhibit No. 15.

Mr. Shenker: Just a minute. I am going to object to that, if the Court please, because obviously that calls for a conclusion and speculation. This is different as to whether there is or is not recorded, and it certainly invades the province of the jury.

The Court: Overruled.

A. The checks total $4500.00 and it is entered as $1500.00 in the cash receipts book.

Q. For what month, sir? A. For January, 1951.

Plaintiff's Exhibit No. 7 is entered on Exhibit 15 as it is on the check.

Q. Now I will show you Plaintiff's Exhibits Nos. 8 and 9, and ask you to tell us, compare that with the Exhibit 16, and ask you how that is entered, sir.

A. The two checks are $3500.00; the entry in the book is for $1500.00.

Mr. Shenker: I am going to ask that that be stricken and the jury be instructed to disregard it, because, further, for the reason that that is a conclusion and opinion and speculation on the part of this witness.

The Court: Overruled.

Plaintiff's Exhibit No. 10, a check for $742.00, was not entered in either Exhibits Nos. 14, 15 or 16.

I am familiar with the tax return of defendant, Mr. Dillon. I have made a total of the income or the alleged [fol. 41] income which has been introduced in evidence which was not included in the books and records of the defendant.

Q. And what is it composed of? * * *

Mr. Shenker: May I, if it please the Court, object to the form of the question, which says "alleged income"; we submit, if the Court please, that there has been no evidence offered on which to predicate that.

The Court: Overruled.

The Witness: Will you restate your question, sir?

The Court: Well, I think you can improve on it, if you will ask it over again.

Q. Do you know what he has listed as his gross receipts?
A. Yes, sir.
I know what his books and tax return show for the year 1951. I have been in Court during the entire trial and listened to the testimony.
Q. How much additional income did the defendant have, other than what was reported in the return and on the books?

Mr. Shenker: Just a minute. I am going to object to that, if the Court please, on the ground that it is leading and suggestive, assumes facts which are not in evidence, and calls for a conclusion and speculation on the part of this witness, and invades the province of the jury.

The Court: Overruled.

Mr. Witness, you have testified with reference to Exhibits 4 to 10? A. Yes, sir.

The Court: Now, taking Exhibits 5 to 10, which you said you compared with the income for the year 1951——
A. Yes, sir.

The Court: Now, what is the amount of this tax which you find unrecorded in the record, 15 and 16, for 1951?
Is that your question?

Mr. Rehm: Yes, sir.
A. $5,000.00.

The Court: Is that the total? A. Yes, sir.

• • • • • • • •

[fol. 42] The Court: How much is check 10?

Mr. Rehm: $742.17.

The Witness: $5,742.17.

Q. Now, that is the amount that the books are understated? A. When?

Mr. Shenker: Going to object to that, if your Honor please, for the reasons previously given.

The Court: Objection will be sustained to the form of the question.

Q. The total amount of unreported income was how much, sir?

Mr. Shenker: Well, I am going to object, if the Court please, on the ground that that is a conclusion and opnion, leading and suggestive, calling for a conclusion, no basis for the question.

The Court: According to the testimony of the witness—I presume you want to add that onto the question—it will be overruled—the objection.

A. $5,742.17.

Q. What was the total income, gross, received for the year 1951?

Mr. Shenker: May we, if the Court please, may this question be subject to the same objection that we have been making to this line of questioning, on the ground that there is no foundation laid for this conclusion and opinion on the part of this witness, that it is totally incompetent and immaterial?

The Court: It may be.

The gross receipts as shown on here are in the amount of $13,495.00. The total gross receipts that I found was $19,237.17.

Q. What was the gross receipts then? A. $19,237.17.

The Court: You mean adding on the $5,742.17 figure he has just testified to?

Mr. Rehm: Onto the gross receipts, yes.

Mr. Shenker: May that question be subject to the same objection, your Honor?

The Court: Overruled.

* * * * * * *

Q. Assuming that an individual whose residence and [fol. 43] place of business was in the City of St. Louis, Missouri, and whose regular accounting period was on the basis of a calendar year, and assuming that such individual derived and received a gross income of $19,238.09; further assuming that such individual was entitled to and allowed by the provisions of the Revenue Acts of the United States statutory deductions in the amount of $6,580.64; and further assuming that . . . the individual was over sixty-five years of age, and that the taxable net income of such individual for the calendar year beginning January 1, 1951, and ending December 31, 1951, was $12,657.45; and further assuming that such individual filed a personal income tax return; what amount of income tax would you say such individual owed and should have paid the Government for that calendar year?

Mr. Shenker: Just a minute. Going to object, if the Court please, on the ground that the question is incompetent in form, that this witness is incompetent to answer, and that the question as addressed to the witness is incompetent, because there was no proper foundation laid for the various items that are included in the question; that this question assumes items which are not included by proof in the record, and that the question does not distinguish between items that may be taxable income and items that may not be taxable income, and that there is no testimony to prove, so far as any of the items which are included in the question, as to the nature and the character of the items, no foundation laid for the items relating to the checks in the computation of taxable income, and there is no showing and foundation laid for the purpose of showing wherein the checks—that the said checks and the payments, if any—what checks represent income.

The Court: Overruled.

Mr. Shenker: I just have one more sentence.

The Court: Well, I have heard your objection, there is no doubt about it, unless you get on something new, that you have got it.

Mr. Shenker: Well, we further object to it, that it calls for a conclusion and opinion of this witness, that it is com-

[fol. 44] ment on testimony and that it characterizes testimony by him, and that it ultimately invades the province of the jury in so far as his testifying to a conclusion is concerned.

The Court: Overruled.

A. The tax liability would have been $3,264.41 . . . on a taxable net income of $12,657.45. I have examined Plaintiff's Exhibit No. 14, the cash receipts book. It shows a total amount of $5,073.66. I have made a comparison of Exhibits 4 and 13 with Exhibit 14. One of those receipts was not reported at all and the other was reported one-half. One is for $2,000.00 and the other is for $1,000.00. Exhibit No. 4 in the amount of $1,000.00 is not reported at all in the cash receipts book, Exhibit No. 14. Exhibit 13 is in the amount of $2,000.00 and there is only one-half of it reported on Exhibit 14. The total of the receipts that have been reported and those upnreported amount to $7,073.66.

Q. All right, now Mr. Wallace, assuming that an individual, whose residence was in the City of St. Louis, Missouri, and whose regular accounting period was on the basis of a fiscal year, and assuming that such individual received gross income of $7,073.66; and further assuming that such individual was entitled to and allowed by the provisions of Revenue Acts of the United States statutory deductions in the amount of $3,547.55; and further assume that——

The Court: Where do you get that figure from?

Mr. Rehm: $3,547.55?

The Court: Yes.

Mr. Rehm: From the return, sir.

Q. (Continuing) Further assume that such individual is over sixty-five years of age, and assume that it was a tax return on an optional adjusted gross income basis, and further assuming that the taxable adjusted gross income of such individual for the calendar year beginning January 1, 1950, and ending December 31, 1950, was $3,526.11; and further assuming that such individual filed a personal income tax return, what amount of income tax would you say such individual owed and should have paid the Government for that calendar year?

[fol. 45] Mr. Shenker: May I, if the Court please, incorporate the objection that we made to the hypothetical question that was asked with reference to 1951, the same as if it was repeated here, so far as this question is concerned?

The Court: Same ruling on the same objection.

A. $343.00 . . . on an adjusted gross of $3,526.11.

Cross Examination, by Mr. Shenker.

Exhibit No. 14 was received from the records of the defendant. I took it over to my office and made a copy. I returned the book to Mr. Dillon but I don't recall when. I kept it for possibly six weeks or two months and made photostatic copies of the sheets that I wanted.

The testimony as to plaintiff's Exhibit No. 4 and No. 13 related to plaintiff's Exhibit No. 14. I compared plaintiff's Exhibit Nos. 5, 6, 7, 8 and 9 with Exhibits Nos. 14, 15 and 16.

Plaintiff's Exhibits Nos. 14, 15 and 16 are records of the fees received in most instances.

Q. Well, is there anything else entered there besides fees? It is income, is that it, it is a record of income, isn't it?

A. Return of expense or advance—advanced fee, I guess you would say—or retainer, yes.

Q. Well, that is a fee, isn't it? In other words, there is nothing reflected on these sheets excepting actual income which is retained by the taxpayer, isn't that correct, sir?

* * * * * * *

A. There is a Public Service dividend listed on this particular one.

Defendant told me that this book was a record of his income. Defendant told me that he only recorded on plaintiff's Exhibits Nos. 14, 15 and 16 those matters or items which he considered as income to him. After the first visit I made to see Mr. Dillon, I asked him about some items that had come to my attention, and why they were not recorded here, and his explanation was at that time it was not income to him. Defendant gave me other records which I retained in my office for several months and [fol. 46] returned to him and in those records other money

transactions were reflected which Mr. Dillon said were not income to him.

Mr. Dillon gave me some records which I returned after some period of time wherein it showed that there had been a deposit made relative to Exhibits Nos. 5 and 6. It showed no disposition of that money.

I inspected and examined other records of defendant and had discussions with him about them.

Mr. Dillon told me that all his income is represented by these checks from which I took those photostats. I made photostats of some other records.

Q. And Mr. Dillon told you that other things which were not his income and are represented by the other records, and he made an explanation of that to you, did he not?

A. There was no substantiation of these things that he told me about.

I talked to Mr. Tom Packs today, the person whose signature was identified here today as being a part of exhibits 4, 5, 6, 7, 8, 9 and 10. I talked to him in the hall around the court room. Mr. Dillon showed me his check stub book. I don't recall seeing a bank book. I saw some of the cancelled checks but not all of them. He didn't show all. I asked for all cancelled checks for 1950 and 1951. I don't believe he delivered all the cancelled checks to me. At that time I was not working with another agent, Mr. Gastorf, the gentleman sitting over there who came in later in the case. I was not able to get all the cancelled checks although I tried. I do not know of any particular cancelled check off hand that I was looking for which wasn't there. I believe my record would show which ones that I was looking for. (The witness refers to a record.) I couldn't tell you which check I couldn't find from this record that I have here. I don't know any particular one that I was looking for.

I first saw Mr. Dillon on February 6, 1952. That was a [fol. 47] considerable time before Mr. Dillon's return was filed for 1951. Plaintiff's Exhibit No. 2, the 1951 return, shows that it was filed on March 17, 1952. I saw Mr. Dillon a month and 11 days before the return for 1951 was filed. I saw him three times from February 6, to about March 17, 1952. I had his records. Exhibits 14, 15 and 16 are photostats from the pages of defendant's Exhibit A. I examined defendant's Exhibit B. It does not deal with income receipts.

The writing on plaintiff's Exhibit No. 2 does not appear to be Mr. Dillon's handwriting. The signature is his.

Redirect Examination, by Mr. Rehm.

Defendant's Exhibit B is a record of traveling expense and airplane fares, railroad fares, and so forth. There is no argument about the expenses. The Public Service dividend was not included in the total fees when I arrived at a total of Exhibits 15 and 16 and in arriving at the gross receipts from income.

Questions by the Court.

The income as shown by the defendant's book for the year 1950 corresponded with the income tax return filed. That is not true for the year 1951, as there is a difference between the income shown in the book and the return.

Recross Examination, by Mr. Shenker.

The return for the year 1951 showed more income than the book.

Q. * * * Now, I will ask you if you will please say—would state there was argument about expenses with Mr. Dillon—do you remember if you allowed all of this expenses? A. No, sir.

Q. You did not. So there was considerable argument about it, wasn't there?

A. In so far as the civil law is concerned, yes, sir.

The Court: We are not trying the civil case here. Do I understand in this case the United States Government has not given the defendant every opportunity to see these things?

[fol. 48] Mr. Rehm: In this criminal case the Government has, sir.

Mr. Shenker: Of course, I think that they opened it up, your Honor, and we are entitled——

The Court: We are not trying a civil case here. I presume you will ask me to instruct the jury to that effect. You usually do.

Mr. Rehm: I presume that is correct.

The Court: If you don't, I will instruct them anyhow.

Mr. Rehm: We didn't open it up, your Honor.

The Court: Objection sustained.

Mr. Rehm: * * * The Government will rest.

* * * * * * * *

Mr. Shenker: The defendant rests.

[fol. 49] Which Was All the Evidence in the Case.

And Thereupon Mr. Shenker, on behalf of the defendant, and out of the hearing of the jury, dictated the following motion into the record:

Mr. Shenker: Defendant moves the Court, at the close of the Government's case and the close of the entire case, to withdraw the case from the consideration of the jury and to enter a judgment of acquittal on behalf of the defendant, and on each of the counts of the indictment, for the following reasons:

That the evidence is insufficient to sustain a conviction; that the Government has failed to prove with that degree of proof that is required in income tax cases, the essential—in the attempted evasion of income tax, the attempted and —essential characteristics and material matters in order to support each of the counts of the indictment. The Government has failed to prove by that degree of proof that is required that there was additional income to the taxpayer in the year 1950 and the year 1951; that the evidence is wholly circumstantial in its nature and does not exclude every reasonable hypothesis other than that of guilt of the defendant for either of the years in question; that there was no sufficient proof to identify the alleged payments, as to whether they were received by the defendant, and, if they were received by him, as to whether they were income to him.

[fol. 50] That there has been no showing made that the books and records which were turned over by the defendant to the agents did not accurately reflect the income of the defendant for the years in question; that the evidence, under its most favorable interpretation to the Government, fails to show any substantial deficiency for the year 1950;

that the evidence is insufficient to show under-statement of income or tax for either of the years in question.

The Court: Motion overruled.

At this point, 4:00 p. m., Monday, March 15, 1954, a recess was had until 10:00 o'clock a. m., Tuesday, March 16, 1954.

[fol. 51] Following the overnight recess, the court convened at 10:00 o'clock a. m., on Tuesday, March 16, 1954, and the following proceedings were had:

Mr. Shenker: If the Court please, if I may refer to the matter at hand, if the Court please, the case of the United States vs. Paul Dillon, the defendant will at this time ask that a mistrial be declared, for the reason that two newspaper articles that appeared yesterday in the Post-Dispatch and the Globe Democrat—I had them marked as Defendant's Exhibits C and D—and respectfully request the Court to look at these articles; they seem to be very damaging and contain matters and things which I had considered damaging to the defendant; and we also ask the Court to make inquiry of the jury as to any effect that these articles have had on them in connection with this case.

The Court: What do you want me to ask the jury?

Mr. Shenker: Whether they read the articles and what effect they had on them.

The Court: Well, bring the jury in. Well, wait a minute before you bring the jury in.

Mr. Shenker: May I offer these into evidence? That is, Defendant's Exhibit C is an edition of the St. Louis Post-Dispatch, and the Defendant's Exhibit D is an edition [fol. 52] of the St. Louis Globe Democrat, the Globe bearing date March 16, 1954, and the Post bearing date March 15, 1954.

* * * * * * *

The Court: Bring the jury in.

(The jury is brought into the jury box.)

(Exhibit C is a copy of the St. Louis Post-Dispatch dated March 15, 1954. The pertinent article is set out below.)

(Exhibit C is a copy of the St. Louis Post-Dispatch dated March 15, 1954. The pertinent article is set out below.)

On Trial

—By a Post-Dispatch Photographer.
PAUL DILLON

TESTIMONY OPENS IN PAUL DILLON INCOME TAX TRIAL

Prosecutor Tells Jury Attorney Did Not Fully Report Earnings for 2 Years.

Testimony began today in the trial of Paul Dillon, St. Louis attorney charged with federal income tax evasion, after Assistant United States Attorney Charles Rehm in the Government's opening statement said Dillon failed to report fully income received from two sources in 1950 and 1951.

Rehm told a jury of 12 men in United States District Judge Rubey M. Hulen's court that Dillon reported only $3284 of more than $10,000 paid to him by Tom Packs, St. Louis sports promoter, and reported only $1250 of $3250 paid him by a Meridian (Miss.) client.

Dillon, long active in Democratic politics, was indicted last November on charges of filing "false and fraudulent returns." The indictment, in two counts, said he attempted to evade payment of $1779 in 1950 and 1951.

Gross income of $1526, on which he paid $32, was reported by Dillon in 1950, it was alleged, while he should have paid $189 on an actual gross income of $2626. For 1951, the indictment said, he paid $1642 on a reported income of $8022 when he should have paid $3264 on an actual income of $12,656.

First Government witness was Ernest Flinn, assistant district director of the Internal Revenue Service, who testified Dillon has now paid $7740 in taxes, penalties and interest due on 1950 and 1951 income.

Dillon, in January 1953, filed a petition with the United States Tax Court in Washington contesting a tax deficiency assessment for the years 1949-51 which at that time totaled $6695. His application to practice before the Treasury Department was rejected in 1951 because of an "unfavorable report" issued by the St. Louis office of the Internal Revenue Service.

Dillon, 76 years old, is a friend of former President Truman and was St. Louis campaign manager when Truman first ran for the United States Senate in 1934. He also was a close friend of former Internal Revenue Collector James P. Finnegan, now serving a two-year prison term for misconduct in office, and was attorney for ex-Sheriff John F. Dougherty, a St. Louis representative of the Capone crime syndicate.

Dillon received a $10,000 fee in 1948 for his activities in behalf of four leaders of the Capone syndicate who received paroles from federal prisons. They were Louis (Little New York) Campagna, Paul (The Waiter) Ricca, Charles (Cherry Nose) Gioe and Philip D'Andrea. As the result of an ensuing investigation, three of the paroles were revoked and two of the men returned to prison.

COPY BOUND CLOSE IN CENTER

dated March 16, 1954. The pertinent article is set out below.)

Dillon Offers No Defense in Tax Fund Trial

Paul Dillon, St. Louis attorney, failed to take the witness stand or offer any testimony in his behalf in his income tax evasion trial yesterday in Federal Judge Ruby M. Hulen's court.

Paul Dillon

The trial opened yesterday and testimony was completed at 3:45 p. m. after the government offered five witnesses to support its charge that the 78-year-old attorney tried to evade payment of $1779 in taxes for 1950 and 1951.

The case will go to the 12-man jury today after closing arguments by government and defense attorneys and instructions by Judge Hulen. If convicted, Dillon faces a maximum punishment of five years in prison and a $10,000 fine on each of the two counts in the indictment, returned last November.

GOVERNMENT'S FIGURES

Dillon long has been active in Democratic politics and in 1934 was St. Louis campaign manager for former President Truman when Truman was elected to his first term in the United States Senate.

Ernest M. Flinn, assistant district director of the Internal Revenue Service, told the jury that in 1951 Dillon received nearly $9000 from the Thomas Packs Amusement Enterprises, but that only $3284 of this amount was recorded in Dillon's tax return.

Carl Wallace, an income tax agent, testified that Dillon's gross income in 1951 was $19,237 but that he failed to report $5742 of that amount. Dillon, he added, had deductions of $6580, leaving a taxable income of $12,657, on which he owed a tax of $3264.

But on his return, the indictment charges, Dillon listed only $8022 taxable income and paid a tax of only $1642.

Sam Broadhead, a Meridian, Miss., lumberman, testified he paid Dillon $2000 in cash in a Meridian hotel on Mar. 20, 1950, for "services rendered." The witness did not explain what these services were.

Carl Wallace, an income tax agent, told the jury that Dillon's cash receipt book showed a $2000 payment in 1950 but the lawyer's income book, which he kept separately, showed only $1000.

WIDE DISCREPANCY

Wallace said he asked Dillon why certain items were not shown in the income book. Dillon, he said, replied he did not consider them "income to me."

The tax agent testified that Dillon's gross income for 1950 amounted to $7073 and his deductions to $3547. That left a taxable income of $3526, on which a tax of $343 was due, Wallace said.

However, the indictment charges that Dillon's taxable income was $2526 and the tax due amounted to $189. Dillon actually reported only $1526 taxable income and paid a tax of only $32, it is charged.

Flinn testified that Dillon has paid the government $7740 in taxes, penalties and interest on his civil liability for 1950 and 1951.

Defendant's Exhibit D.

[fol. 55] The Court: Members of the jury, there has been some complaint made about some newspaper items that appeared concerning this case, in the papers. Of course, I didn't cover that when I said you were not to talk to anybody or let anybody talk to you about the case, but you all stated you would try this case solely according to the evidence you hear here in the court room and according to my instruction as to the law. I want to ask you gentlemen, at the request of counsel, is there any one of you who read any item in the newspaper or heard anything over the radio, if there was anything on the radio—I don't know—that would be in any manner, shape, or form influenced by anything you may have read in the newspapers? If so, raise your hand.

A Juror: I read that article, but I don't think it would influence me.

[fol. 56] The Court: Would it in any way influence you in the trial of this case?

The Juror: I didn't—the article didn't make sense to me.

The Court: Well, frequently don't, when you hear all the evidence in the case. But somebody out on the street, why, it may sound more reasonable to them. Reporters in the court room may not appreciate that remark, but I often feel that way.

Now, did anybody else read it?

(No response.)

Just the one juror, and I understood you to say it won't affect you in the slightest?

The Juror: Not a bit.

The Court: And you say what you read, you didn't get any sense out of, after having heard the testimony here, and you think you can disregard everything you may have read in the newspaper and decide the case according to the evidence you heard here?

The Juror: Yes.

The Court: Very well. Proceed with the argument. Thirty minutes on a side.

And Thereupon Mr. Tucker made his closing argument on behalf of the Government.

[fol. 57] Mr. Shenker made the following closing argument on behalf of the defendant. May it please the Court, gentlemen of the jury:

This is probably the shortest case—the shortest income tax case on record, and I shall attempt, in the few minutes that have been allotted to me—my time will be a half hour—regardless of what I may have to say after the half hour is over, then it is too late—in the half hour that I have I shall attempt to be as factual as I can, in an attempt to give you that which I think is the proper deduction to be made from the evidence in this case.

I shall not attempt, as my opponent here attempted, to appeal to your prejudices because it is March 15 or March and because you have to pay taxes, and so forth; that shall not be my purpose.

At the outset, let me say this to you, Gentlemen: You are a new jury and undoubtedly many of you have not had occasion to have experience in being a criminal juror. You are the judges of the facts. It is my duty to cross-examine witnesses and to present evidence or not present evidence, as I see fit. It is the Government's duty to carry the burden to produce evidence, and it is the Court's duty to [fol. 58] supervise the trial and to instruct you on all of the law that is applicable to the case, a function which no doubt the Court will perform and will perform ably.

The only thing that you have to do—and it is by far the most important of all, as I can see it, is to decide the facts in the case. In other words, you must take the law as it is given by the Court and apply it to the facts that are in evidence here; nothing else outside of the record counts, as far as this case is concerned. It must be your decision, and your determination must be based absolutely on the facts.

Now, let's see what are the facts in this case. The facts in this case show that on February 6, 1951, Agent Wallace came and started an investigation of Mr. Dillon's income tax returns—I believe he testified for the years '49 and '50; and then also after that '51.

Now, that date of February 6 is important, because that was a month and eleven days before Mr. Dillon filed his 1951 return. If you recall, the 1951 return was filed on March 17, 1952. So the examination goes on from February 6.

Mr. Wallace testified that he had made at least three visits to Mr. Dillon's office; he said that the books were made available to him, the records were made available to him; he did say that some of the canceled checks he couldn't find, although he couldn't say what checks he was [fol. 59] missing or what checks he was looking for.

Now, what occurred, you gentlemen noticed, these accounts, they show one photostat of one sheet, although all the books and records were made available here in the court room, they did not use them, they just used the photostat that was taken from Mr. Dillon's books. Now this is from his books and it shows the entry of certain fees that were given.

Now, then, for 1950 they show the two sheets that were photostatted. Now, if you recall Mr. Wallace's testimony —and you must have these sheets with Mr. Wallace's testimony, because that is what it is—Mr. Wallace testified that Mr. Dillon recorded here only that which was income to him. Now, that is very important, gentlemen, because that is the evidence and the testimony that Mr. Wallace, the Agent, himself gave. He said that that is—that Mr. Dillon reported on these sheets that which was income to him; he said he also saw the check stubs and the other records that Mr. Dillon kept, but all they offered into evidence were these sheets which show—and I recall distinctly I asked him that—which show the income that was income to Mr. Dillon. In other words, it shows the money that was income to Mr. Dillon. Now, that is Mr. Wallace's testimony and that is what these records show.

Now, then, I will ask you, Gentlemen, what else [fol. 60] have you got after that? You have got, in addition to that, a number of checks plus this here sheet of Mr. Broadhead.

Now, I think it is only appropriate that I take them one at a time. As to Mr. Broadhead's sheet, Mr. Broadhead said he paid Mr. Dillon $2,000.00 in cash, out of court, then that he paid the fine.

Now, Mr. Broadhead testified that Mr. Dillon was one of the lawyers and that there was also a lawyer—a lawyer in Mississippi—a Mr. Mize, who was associated with Mr. Dillon in the case, and that, Mr. Broadhead said, and so did the other gentleman that testified to support Mr. Broadhead, that Mr. Broadhead paid Mize no money at all, that any arrangements that were made for Mize's services were supposed to be taken care of by Mr. Dillon.

I will ask you, Gentlemen, isn't the reasonable and natural presumption and inference that Mr. Broadhead paid Mr. Dillon the $2,000.00 and Mr. Dillon split the fee with Mr. Mize? Now, if that was not the fact, you know that they would have brought Mr. Mize to testify that he did not get a thousand dollars. That is only the reasonable fee. You gentlemen are men of experience. Of course, that is the way lawyers work. Why would Mr. Mize work for nothing for Mr. Dillon? Mr. Dillon said he paid Mr. Mize for some other work that he did for him, nothing in connection with this case at all. So that disposes of this case.

[fol. 61] There is another matter which is very important in this instance, and that is this: Of all the matters that are involved in this litigation, there is only one two-thousand-dollar cash item. Now, that is important because if a man is going to cheat, that is the item he would cheat on. Now, why did Mr. Dillon enter the thousand dollars cash in his books? That should answer that question once and for all, that there, why the Agent wouldn't have even known that Mr. Dillon was paid by Mr. Broadhead if it hadn't been for the fact that Mr. Dillon's record showed that he got a thousand dollars in cash from Mr. Broadhead, which was his fee, and the Agent testified that these records show those which are fees and income to Mr. Dillon. And so that disposes of that matter.

Now, let's see about these checks. And here there is a blackout. Keep in mind, Gentlemen, that the Court will instruct you that the burden of proving the case is upon the Government. In other words, if a man is brought into the court room and he is suspected of a crime, be it income tax or anything else, there is the burden upon the Government to prove that he is guilty of the offense with which he is charged. It is not right that you gentlemen

just say, "Well, because he is here, he is guilty." And I am satisfied the Court will require that for this case.

The burden is upon the Government to prove the charge. [fol. 62] I don't say that they must prove that beyond any and all doubt; they must prove it at least beyond a reasonable doubt. All right.

Now, I will ask you, if you please, is there one scintilla of evidence—and this, Gentlemen, is very important—is there one scintilla of evidence what these checks were for? Search the records, if you please. These checks, they brought in the bookkeeper who said—who identified Mr. Packs' signature, and he said they were signed by Mr. Packs, of the Thomas N. Packs Amusement Enterprises. I asked Mr. Wallace, if you please, Gentlemen, if he saw—when he saw Mr. Packs last, and he said yesterday, the very day that he testified. I asked him where he saw him and he said, "Right here in the court room."

Now, Gentlemen, if these checks are income to Mr. Dillon, why there is a simple way to prove it, that Mr. Packs would have taken the stand and testified.

I asked the man who testified for the Packs Industries if he had any transactions with Mr. Dillon and he said no. Now, if these checks are fees and income to Mr. Dillon, obviously, without any question, Mr. Packs would have taken the stand and testified.

Now, many of you know that the mere receipt of money does not mean income, the mere fact that the man receives money is not income.

[fol. 63] Furthermore, let me show you something. You have seen these exhibits. I am sure you will take them into the jury room. Some of these checks show legal services.

One was for a thousand dollars, in March, 1950.

There is one for $284.67, which is entered in the book, shows legal services.

There is one—That is all, those are the only two that show legal services. Now, this is important, Gentlemen: Why would these show legal services and why would the other checks not show legal services? There must be a reason for it. Keep it in mind it is not up to us to prove to you that we are innocent; that there is a presumption of innocence; it is up to the Government to prove that we are guilty. Now, where is that proof? I am just trying to be, believe me, just as objective about it as a person

can be. Where is that proof? Are you ready to say that every time a check is made payable to a man and he receives it, that that is income to him? Why, obviously not. You cannot say that. You are men of affairs. It cannot be. They must have some proof.

Now, they prove the Broadhead thing, where they brought in Mr. Broadhead, who said he paid a fee and that he recorded $1,250.00

He testified about a two thousand dollars.

If they didn't realize that they had to prove that, why did they bring not only Mr. Broadhead, but they brought [fol. 64] in his secretary to show that. Why, there isn't any question about their not being able to get the evidence. This is only a matter that took place three years ago, not a case we are trying ten years later, and that proof conclusively with respect to books was available. Why did they not bring in an exhibit of assets, that tells what defendant carried on the books, and you jurors have a right and it is your duty and right to have everything the Government has showing that Mr. Dillon is guilty. Fine. "We will convict for you if you bring me in the evidence, you bring me in the evidence to show me that it is income." They haven't shown that to you.

Now, something else in these. There are two checks, both of them dated December 30, 1950. One was for $4,000.00 and one was for $500.00. Now, keep that in mind. Both of them dated the same date. Those are the items that the Government contends that were received in 1951. We have no record of what part of what year that came in here, whether there were two checks instead of one, drawn the same time, consecutive numbers—2000 and 2001. Why were there two checks? The record is silent. It is just as reasonable, Gentlemen, if you please, to assume that one of them was for Dillon for some purpose and another one was for another purpose. Just as reasonable, if you will, please. Just as reasonable to assume that, and more so, than to assume it is income. Not a word said [fol. 65] in there, anything about fees; nothing at all.

Now, you have got another situation in here. On November 8, 1951 two checks, one for $3,000.00 and one for $500.00, also consecutive numbers—2224 and 2225, November 8. Now, that check has marked on it—typed on it, "Fees." I don't know when it was typed, but regarding

when it was typed, it doesn't show—left with you, gentlemen.

Now, what was that money for? Why should you, as a jury, or Mr. Dillon, as a defendant, have to prove that it was not income? It is up to the Government to prove that it was, if you please.

I am just—I am trying to strip it of every complicated matter. I just want to cut it down to the bare, bare, bare distinction that at least somebody should have gotten up and testified what it was. They did not account for the absence of an eye-witness, and I showed Mr. Packs was here. I submit to you, Gentlemen, that is highly important.

Then the only other item that is involved is in December, 1951, for $742.17, also bears—doesn't say what it is for.

Now, gentlemen, keep in mind the fact that the investigation was going on a month and eleven days before the income tax return was prepared for 1951. Certainly [fol. 66] Mr. Dillon, even in his advanced age, which the record shows is over 65, and you are able to see it yourself, that he is considerably over 65, would know, he would certainly have no reason to conceal correct income, anything that may have been wrong, if he felt or if that money was income to him. The fact that he didn't is a circumstance to you gentlemen to show to you that he was confident that it was not income to him and he was not reporting that part as income to him. Why, if that was income to him, don't you think that that would have appeared in his net worth statement? You are men of experience. They would have brought in his net worth, they would have brought in his bank deposits, they would have brought anything to see what he does with his money. The evidence that they didn't would indicate that to you.

And remember we made everything available to them. Even right here in the court room. There was never any question; the agent said everything was made available. Well, why didn't they bring those things in? There is only one conclusion to reach: because it didn't help their purpose. That is the reason. Because if it had helped their purpose they would have brought it in, and then you would have had an opportunity to see the real evidence in the matter. And again I say to you gentlemen that in so far as

proving the case, that is not up to you to prove the case; that is up to the Government.

[fol. 67] Now, where is the proof? I will say to you, if the proof is there, you should do your duty; but where is the proof? Why, it is ridiculous. Mize would have been working for nothing.

If Mr. Packs would testify that these payments were made to Mr. Dillon as income, don't you think that they would have put him on the stand? He was right here. I ask you, if you are confronted with a criminal charge, is it too much to expect the least the Government should do is put the witnesses on the witness stand to testify what those payments were for? They picked out of all the records they examined, they introduced three sheets to you.

Now, I will say Mr. Wallace was fair in this respect: he said these records of different items which were income to Mr. Dillon, he said Mr. Dillon told him this is not a regular elaborate bookkeeping system. You want to get all the records that you have—and he said he took photostatic copies of the other records—the bank deposits, the bank withdrawals, the check stubs—the other records which show and then they could have done that.

I say to you it is some responsibility to make a determination, and in all sincerity and in all fairness, that you make this determination, that the Government has not introduced sufficient evidence from which to expect a jury to be convinced that Mr. Dillon cheated on his income [fol. 68] tax, and in the absence of that, I submit to you that there is no reason why we should be compelled to prove innocence.

Now, let's go a little bit further on this. They introduced that Exhibit No. 3. Exhibit No. 3 is an assessment on taxes; in other words, it was objected to after they introduced the exhibit, when I questioned Mr. Flinn about total taxes that were paid. You gentlemen are familiar with that. That when an assessment is made, you pay it and then you litigate in tax court about it, whether you owe it or not. That is a matter, of course, which is not concerned here, excepting it doesn't show any desire or any intent to evade or defeat the taxes. You must remember there can be a difference of opinion possible as to whether there are any taxes or not, whether it is tax-

able or not, that is to be determineed under civil proceedings. It is not included with this case. The only way he can be convicted and the only way that Mr. Dillon can be convicted is if you can say to yourselves, gentlemen, that on the basis of the evidence that was introduced here, that you and each of you are convinced beyond a reasonable doubt that Mr. Dillon willfully, and unlawfully, and intentionally filed a return which did not reflect his true income, with the intent, express intent of attempting to evade and defeat a tax.

I will ask you, where is that evidence? I mean I am just voicing, boiling it down to the bare essentials. [fol. 69] Where is that evidence?

Now, of course—and I am satisfied that the Court will instruct you that—a crime can be proved by circumstantial evidence. Certainly it can. But the basic proposition is still there—that they must prove beyond a reasonable doubt—not beyond all doubt, that doesn't mean because somebody might have some preconceived notion or some fantastic idea—just beyond reasonable doubt. Now, it can be established by circumstantial evidence; but remember, in circumstantial evidence, each link, each point of the circumstances must be so forged together that it permits of no other interpretation excepting that of the guilt of the defendant. If you can reconcile it with any other reasonable theory but that of the guilt of the defendant, then you must find not guilty.

The Court—I have heard the Court use as an example blocks, that there is a puzzle or a thing in there, you take various blocks, fill in, and if all the blocks fit, then there can be—if all the blocks fit in to make it complete, then there can be no reasonable theory on which you can find innocence; but if all the blocks can also be consistent with innocence, then I say to you that you as jurors must find it—must find that way. Because the presumption of innocence is there. And if you can reconcile circumstantial evidence on any reasonable theory but that of guilt of [fol. 70] the defendant, then you must find the defendant not guilty.

Now, it would certainly be, I say and it appears to me, a travesty on justice, if they could withhold—the Government could withhold evidence which was pertinent and

which would prove defendant guilty if they did put it on, and wouldn't be fair to you, wouldn't be fair, they wouldn't be doing their job. In other words, these gentlemen wouldn't be doing their job as lawyers and as members of the United States District Attorney's office, members of the Justice Department, if they have evidence which proves the defendant's guilt, if they did not offer it. And I don't think you should attribute bad conduct to them—the fact that they didn't use Mr. Packs, the fact that they didn't offer that evidence for you to assume that the evidence cannot help them. Because I don't think that these men are dishonest men, and they wouldn't deliberately withhold evidence from a jury which proved the defendant's guilt. It is not their duty, of course, to introduce evidence showing the innocence of a man, but it is certainly their duty to introduce all the evidence which would show the defendant's guilt; and if those witnesses—Mr. Packs or anyone that could offer any evidence to show that these checks were income, then, of course, they would introduce them; and I showed to you that Mr. Packs was right here in the courtroom.

Now, the Court has asked you to be good jurors and to [fol. 71] be so that you can give the defendant a fair trial. Now, gentlemen, a fair trial, as jurors, is not lip service. It is more than that. A fair trial and to be good jurors means exactly what it says. It means that, under your sworn duty, you are the triers of the facts, and unlike a civil case, wherein the greater weight of the evidence prevails, like in a tax case, if Mr. Dillon is to get his money back, he has to carry the burden of proof that he doesn't owe that. In a criminal case, the Government must prove that he owes it—not only that he owes it, but they must prove that he intentionally and willfully filed a return with the fraudulent intent to attempt to defeat or evade a tax.

I submit to you, Gentlemen, that this case is not at an end for the jury; your duty does not end here with listening to the evidence; your duty does not end here in listening to the arguments and the Court's instructions; your duty, for all practical purposes, really begins and is performed in that jury room, where you are supreme, Gentlemen; we cannot question any finding of fact that you make; it is final and conclusive in so far as findings of fact by the jury.

If the Courts were to commit an error of law, it could be corrected by an appellate court—and by that I am not saying the Court will commit an error—I am only saying what could be done; but the jury that made the findings [fol. 72] of fact, that cannot be disturbed.

Now, I suggest this, in so far as these items are concerned: Mr. Packs owes somebody some money. Mr. Packs makes a settlement. Money is received by lawyers that are not fees. There are settlements that lawyers perform, as you know. You have had dealing with lawyers, you have settled cases with lawyers. That doesn't mean that they are fees.

Presumption of innocence, Gentlemen, is a real presumption. It is not to be taken lightly. It is up to the Government to be overcome. They must overcome it beyond a reasonable doubt. Whether they have overcome it or not is for you to say, because you are the triers of the facts. But in making that determination, I call it to your attention to take all of those matters into consideration. Would a man, if you please, enter a cash fee and cheat by entering a part of a check? Why, if a man would do that, he wouldn't be sane. Obviously, the cash fee would be the one that you would attempt to conceal, particularly with an out-of-town client, no Treasury agent knows that fee is there, gentlemen.

The fact that no additional evidence has been offered to you is sufficient for you to consider and to presume that there was no additional evidence available to the Government, and on this evidence I submit to you that it was not controlling, that it is not sufficient.

Keep in mind, Gentlemen, the testimony of Agent [fol. 73] Wallace. Agent Wallace said that the tax returns of Mr. Dillon did portray the income to Mr. Dillon which Mr. Dillon says was income, considered his income. They are not supposed to portray any figures that were not his income. I mean, if you pick a few sheets from some records, that would show only a part of the story. Why didn't they introduce the rest of it? That is important. Certainly, if it only portrays his income, fees is income. Why didn't they go farther on that? There is not a scintilla of evidence, gentlemen, in the case to justify your conclusion that there was a fraud perpetrated by Mr.

Dillon, and I certainly submit to you that under the evidence in this case, that there is only one verdict that you can render that is consistent with this evidence, and that is a verdict of not guilty.

You have been selected in full reliance and complete faith has been placed in you. I will say this to you: it is much easier for a jury to convict that it is to acquit—much easier, because you just go in and you vote guilty; but I don't believe that you gentlemen are that kind. I don't believe that you will so lightly treat a situation. You have a sworn duty to perform and you will take the full responsibility into your hands, and not treat lightly a matter which really is one of the most sacred of all. Not many persons get the opportunity and the privilege to serve on a federal jury.

[fol. 74] The Court: Your time is up.

Mr. Shenker: Thank you.

Not many persons——

May I take just a second, your Honor?

Not many persons ever get the opportunity to serve on a federal jury. It is a grave responsibility. Your responsibility in this case is as great as anyone's, or greater, and I have full faith and confidence in your judgment.

Thank you very much.

Thank you, your Honor.

[fol. 75] Mr. Rehm made the balance of the closing argument on behalf of the Government.

And Thereupon the Court charged the jury, as follows:

The Court's Charge to the Jury.

The Court: Members of the jury, it now becomes my obligation to give you a charge as to the law which you will be governed by in your proceedings in the jury room and reaching a decision on the factual issues that are going to be submitted to you in this case.

In this case, as in all cases that are tried by a jury, you are a part of the administration of justice in this court, and a very important part. Just as important as the judge of this court is. As jurors, as I told you yesterday, you are officers of the court and, therefore, it is just as vital to the administration of justice that you perform your duties as jurors and officers of the court conscientiously, honestly, fairly, impartially, and in accordance with the law as you receive it from me, as it is that I, as the judge of this court, so conduct myself.

In your deliberations in passing upon the factual issues in this case, of course, you will exclude from your minds any feeling of sympathy or prejudice, if you have any, against either of the parties to this case; if you have any feeling about any of the counsel in the case, you will exclude that. We are not trying counsel; in a sense, we are [fol. 76] not trying the defendant; you are trying factual issues, and as you determine those factual issues, you will necessarily be compelled, as you determine the factual issues, to find a verdict of guilty or not guilty on each count of this indictment. And, of course, neither passion, nor prejudice, nor sympathy should influence you in any manner in deciding the case. Because it is your sworn duty to try the case and decide it according to the evidence and my charge as to the law.

I am not giving you a series of instructions, gentlemen; I am giving you a charge, and it is intended, and my purpose is, that the charge shall cover the whole case. It would be highly improper to disregard a part of this charge because you did not like it and accept and use another part of it because that part appealed to you more than the part that you might want to discard. You must accept it as a whole and use it as a whole.

I am giving you this charge orally. Some of you may have served in the state courts, where the charge is given in writing, written instructions are taken by the jury to their jury room. That is not the practice in the federal courts. I have notes here that I use, but I don't have this charge written out so that I could give it to you, and you asked me for it or I wanted to give it to you, so therefore it is necessary that you pay close attention to this [fol. 77] charge and follow it, so that when you retire to the jury room you can use it and apply it.

If, during the course of this charge, I say anything which you understand is a comment on the evidence, and what I say that you interpret to be a comment on the evidence differs from your understanding and belief of the evidence, you disregard what I say as to the evidence that differs from your understanding and belief as to what the evidence is. I say that to you, gentlemen, for this reason: because it is the law that it is your sole province to pass upon the credibility of the witnesses and the weight that you will give to their testimony. It is solely your province to determine what the evidence in this case is, and not mine. In other words, we have in this case twelve jurors, or twelve judges it is better to say, in the jury box, and the twelve jurors in the jury box decide the factual issues, and that is their job exclusively. We have one judge on the bench who decides the law and gives it to the jury, and that is his job exclusively. So you see we have two completely separate and distinct provinces to perform.

Now, in this case an indictment has been returned in two counts, and it is based on a federal statute that has to do with collection of taxes on incomes, and the provision of the statute that this indictment is based on, that part of the statute that concerns the indictment reads as follows:

[fol. 78] "Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter, or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof shall be punished as provided in the statute."

Now, you will notice that that statute does not make as a condition for its violation that the attempt must succeed. The attempt may or may not be successful. Now, based on that statute, the grand jury returned an indictment in two counts, and I think at this time it is well for you to get completely before you the charge as contained in this indictment. Omitting the formal caption, the first count reads as follows:

"That on or about the 15th day of March, 1951, at St. Louis, within the Eastern Division of the Eastern Judicial District of Missouri, and within the jurisdiction of the court aforesaid, Paul Dillon, of St. Louis,

Missouri, did knowingly, wilfully, unlawfully and feloniously attempt to defeat and evade a large part of the income tax due and owing to the United States of America for the calendar year 1950, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Missouri, at St. Louis, a false and fraudulent income tax return wherein he stated that his adjusted gross income for said calendar year was the sum of $1,526.11 and that the amount of income
[fol. 79] tax due and owing thereon was the sum of $32.00, whereas, as he then and there well knew, his adjusted gross income for the said calendar year was the sum of $2,526.11, upon which said adjusted gross income he owed to the United States of America an income tax of $189.00."

Now, count 2 is in similar words, except it charges an attempt to defeat a large portion of the income tax due for the year 1951, by filing a false and fraudulent income tax return, wherein it was reported that the amount of the defendant's gross income was $8,022.91, and that the tax on this income was $1,642.87, and that the defendant then and there well knew his net income for the said calendar year was the sum of $12,656.43, upon which said net income he owed to the United States of America an income tax of $3,264.01.

The indictment, of which I have just read the first count and given you the substance of the second count, I want to reiterate to you it is merely the means by which a defendant is brought to trial in this court on a criminal charge. It constitutes no evidence whatsoever against him, and when you retire to your jury room, I will give you this indictment to take with you, but it is given to you solely for the purpose of identifying the specific charge that you are going to pass upon, that has been made against the defendant, and you will not consider it in any manner as any evidence of the defendant's
[fol. 80] guilt.

The indictment which I read to you, and also the statute which I referred to, uses certain terms, and you would like to know and you should know the meaning that you

should ascribe to those terms. The term "wilfully and feloniously" was used. As used in the indictment and the statute, wilfully means intentionally, and not accidentally; it means or carries with it the idea of knowledge of the criminality of the act alleged to have been committed by the defendant. The word "knowingly" means that state of mind wherein a defendant was in possession of the facts from which he knew or was aware that he could not lawfully do the act whereof he here stands charged. The word "feloniously" means wrongfully, wickedly, and against the admonition of the law. It also carries with it the idea of a deliberate intent to do a wrongful act. It includes unlawfully, of course, for a thing can not be done feloniously without being done unlawfully.

In this case, as in any other criminal case that is tried in this court, the defendant is presumed to be innocent of the charges against him. That presumption is not a meaningless phrase to be cast aside. That presumption applies to every element of the charge against the defendant and remains with the defendant until the evidence in the case overthrows it and you are satisfied beyond a rea- [fol. 81] sonable doubt that the defendant is guilty of the crimes with which he stands charged. There is no obligation upon the defendant to prove his innocence. The burden of proving the defendant's guilt rests upon the United States. And that burden never shifts and that burden can not be sustained unless and until the proof offered by the Government in the case convinces you beyond a reasonable doubt of the guilt of the defendant.

Now, what does a reasonable doubt mean? A reasonable doubt, as we have used that term, means a doubt based upon reason, arising out of the evidence or lack of evidence in this case. A reasonable doubt is such a doubt as leaves a juror's mind so undecided that he does not have an abiding conviction of the defendant's guilt after a full and fair consideration of all the evidence, that is, a settled conviction of guilt, which the juror believes will remain unshaken by future thought and reflection. A reasonable doubt is such a doubt as would cause a reasonable, thoughtful, and prudent person to hesitate to act, if confronted with a question of importance concerning his own affairs. But a reasonable doubt does not arise just from

mere conjecture, speculation, or whim, nor from reluctance to convict through feelings of sympathy or mercy. A reasonable doubt is a conscientious belief arising only after calm, deliberate, and impartial consideration of all the evidence, that there is reason to doubt the defendant's guilt.

[fol. 82] Let me say to you further in this connection, it is not necessary for the Government to prove the guilt of the defendant beyond all possible doubt. If that were the rule, few men, however guilty they might be, would be convicted. In this world of ours, it is practically impossible for a person to be absolutely and completely convinced of any fact which by its nature is not susceptible of mathematical certainty; in consequence, the law is such that in a criminal case it is enough that the defendant's guilt be established beyond a reasonable doubt but not all possible doubt.

Bearing in mind these observations, gentlemen, it becomes your duty to carefully consider the evidence before you, and if, as the result of such consideration, you can and do entertain a reasonable doubt as to the guilt of the defendant, it will be your duty to give such defendant the benefit of the doubt and to acquit the defendant as to each count which you have such a doubt. If, on the other hand, the whole evidence, when considered, produces in your mind a settled belief of the guilt of the accused on trial under one or both of the accounts of the indictment, then it may be said that you are free from reasonable doubt and you should accordingly find a verdict in accordance with your conviction and belief.

Now, let us understand what this case is about. We are concerned with only one thing: did the defendant [fol. 83] file a false and fraudulent tax return, as charged in the indictment, for the year 1950, as charged in count 1 of the indictment, and for the year 1951, as charged in count 2 of the indictment? This is the first factual question for you to determine.

If you find the defendant did file a false return for either or both of the years 1950 and 1951, as charged in the indictment, then the next factual question for you to determine is, did the defendant, at the time of filing the tax return, intend to and intentionally attempt thereby to evade a part of his income tax due and owing for the year or

years that you make the finding that the defendant did file a false and fraudulent return?

If you find the issues in favor of the Government on these two factual questions, then the defendant violated the law that I read to you and as charged in the indictment.

On the count or counts as to which you are unable to make such finding, as to either one of the counts of the indictment which you fail to make such finding, you should find the defendant not guilty.

We are not concerned in this case with the defendant's civil tax liability for income tax which may or may not be due and owing the Government, and whether he did or did not, after filing his tax return, pay part or all of the tax the Government claims was owed to it. If you find the [fol. 84] defendant did file false or fraudulent tax returns for the year or years charged and as set forth in the indictment, and if you find the defendant intentionally filed such returns, knowing them to be false, in an attempt to defeat and evade the tax due and owing on his income, the fact, if you should find it to be a fact, that the attempt failed, that is, the attempt of the defendant to evade payment of income tax due and owing on a substantial part of his income, would not excuse him of the intentional filing of a false or fraudulent return.

The first count of the indictment charges that, for the year 1950, the defendant stated that his adjusted gross income for the year was $1,526.00 and that is stated in the return. And that the amount of tax due and owing on income was $30.00, and that that was stated in the return as filed.

It is the Government's position that for the year 1950, the defendant received from Sam Broadhead, at Meridian, Mississippi, a check for $1,250.00 and $2,000.00 in cash as attorney's fee. You will recall Mr. Broadhead testified to the payment of $1250.00 by check and the $2,000.00 in cash, and that the defendant requested the payment of the $2,000.00 in cash.

You will recall the testimony of the internal revenue agent that of the check for $1250.00, only $250.00 was reported in defendant's cash receipt book, and of the payment in cash of $2,000.00, only $1,000.00 was reported, [fol. 85]) leaving $2,000.00 unreported.

According to the testimony of the Government's witness,

you will recall that the Government's witness' testimony was that the defendant stated to him that the memorandum book showed his cash receipts. Based on this evidence, it is the claim of the Government that the gross receipts for the year 1950, as shown in the return, were $2,000.00 short, and that the tax actually due was approximately $343.00 in place of $32.00.

Now we go to count 2. In count 2, the defendant reported a gross income of $8,022.91, and a tax due of $1,642.87. It is the position of the Government that there was omitted from gross receipts in defendant's tax return for the year 1951 the sum of $5,742.17.

You will recall the Exhibits 5 and 6, which were two checks totaling $4,500.00, payable to the defendant, and which bore his endorsement, and it was the testimony of the Government's witness that only $1500.00 of this sum was entered in the defendant's cash receipts book, leaving a shortage of $3,000.00, according to the Government's witness.

You will also recall, I believe, Exhibits 8 and 9 are two checks totaling $3500.00, and of this $3500.00 only $1500.00 was entered in the cash receipts book, according to the Government's witnesses, and according to the Government's witnesses leaving a shortage of $2,000.00 unreported.

[fol. 86] You will recall the Government's Exhibit No. 10, a check for $742.17, payable to the defendant, and endorsed by the defendant, and that none of this sum was recorded in defendant's cash receipts book.

These three items total a sum of $5,742.17, and according to the Government's testimony they increase the defendant's gross receipts for 1951 to $12,756.43, instead of $8,022.91 as reported by the defendant in his tax return.

If the defendant did, as charged in the indictment, fail to report the additional income as testified to by the Government witnesses, and you find that the income as testified to by the Government witnesses was income which should have been reported by the defendant, then the income tax for defendant for the year 1951 would have been $3,264.01, instead of $1,642.87 as reported by the defendant in his tax return.

It might be well at this point, gentlemen, for me to comment on one feature of the case. I took it from the ques-

tions of the defendant's counsel that he was trying to develop the theory that some of the unreported funds paid the defendant were paid out by the defendant to some other counsel who was associated with him in the lawsuit down in Mississippi. I say to you that questions of counsel are not evidence. As I understand the testimony in this case, there is no evidence in this case of any sums of money being paid to the defendant from the sources named [fol. 87] and the defendant thereafter paying to some counsel who was associated with him in representing the party jointly, all or part of that money. As I recall the testimony of the internal revenue agent, there was some testimony about defendant's claims of having paid out money to other parties, that he received from the sources shown by the evidence, but as I recall the testimony of the Government agent, he said these statements of the defendant as to payment of money could not be verified.

It is not necessary that the Government show, in order to sustain the issues in this case, that the defendant failed to report as income the exact amount set forth in the indictment. If the defendant failed to report a substantial amount of his income for the years in question, that would satisfy that phase of the case.

In this case, defendant's return was prepared on the cash receipts basis; therefore, the amount of all items of gross income should be included in the gross income for the taxable years, that was received by the taxpayer. Any funds to be paid to the defendant in 1950 but not received by him until 1951 are taxable in the latter year. And there is that evidence, because it is my recollection that the two of the checks dated December 30 and 31, 1950, were not shown on the defendant's tax ledger sheet until 1951, in January, so even though they may have been mailed in 1950, the evidence, as shown by that book, is that they were received in 1951.

[fol. 88] Now, the defendant, by his plea of not guilty, denies guilt on every one of the charges contained in the indictment, and, as I understand it, it is the defendant's position that the net income reported by him was proper. It is defendant's position that even though he filed or caused to be filed income tax returns for the years 1950 and 1951, and even if he failed to disclose all his net income for the years 1950 and 1951, and even if the returns

failed to fully disclose all of his tax liability for the years in question, that he had no intention of evading or defeating, or attempting to evade or defeat, the payment of income tax.

Fraud, within the meaning of the charge and the statute, means actual intentional wrongdoing, and the intent required is the specific purpose to evade a tax believed to be owing, and mere negligence or carelessness, whether slight or great, is not equivalent or sufficient. Unless you find that the failure of the defendant to report his true income for any of the years charged, if you so find, was done wilfully and knowingly, with an intent to defeat or evade payment of the income tax on such income not reported, then the defendant cannot be convicted for his failure to correctly report his income, regardless of the amount of income paid and income to have been paid. In other words, innocent failure of the defendant to properly report his net [fol. 89] income or any act in failing to report his true net income, which was not done knowingly and in an attempt to defeat and evade income taxes on such income not received from the defendant would not form the basis of a conviction for knowingly and wilfully failing to report income or attempting to evade the payment of the income tax thereon.

Now, the question of intent, that is a matter—a factual matter for you to decide, like all other factual matters. Intent is a state of the mind, and it has been said you cannot look into a man's mind and see what went on, or what is going on. The only way you have for arriving at the intent of the defendant, if you reach that point in the case, is for you to take into consideration all the facts and circumstances in this case, and as shown by the evidence, and including the exhibits, and determine from the facts and the circumstances, and the exhibits, the intent of the defendant, what his intent was at the times in question, namely, when the income tax returns were filed.

Certain opinions were expressed by the witness, Carl Wallace. You will recall he was the witness who was an employee of the Internal Revenue Department. With reference, among other things, to an estimated income of the defendant for the years in question. And an estimate of the amount of such taxes that would be due, if the facts

considered by him in offering his opinions were true. On [fol. 90] this, you are instructed that expert or opinion evidence is appropriate when the subject matter of the inquiry is such, if any such there has been, that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, then as to how much weight shall be given to such testimony in this case, consider the amount of skill and knowledge, experience, observation, and opportunity for observation that the witness had to qualify him to give expert or opinion testimony as to such matter. Mr. Wallace's opinions were based upon an assumed state of facts, that is a state of facts which is claimed by the Government has been shown by the evidence is true, so that it is important to determine from the evidence whether or not the facts so assumed are established by the evidence.

If you find the facts stated and assumed as a basis of the hypothetical questions and opinions of such expert are not established by the evidence, then the opinions given by the expert witness, based upon such assumed state of facts, are entitled to no weight and you should attach no weight to them in your opinion. It is for you to say whether such assumed state of facts, that is, the facts with reference to the amount of the income of the defendant and the amounts deducted therefrom, assumed to be true by the expert, have been proven, and this you will do from all the evidence in the case bearing upon and tending to prove or [fol. 91] disprove the facts so assumed. And if you find from the evidence in this case the facts assumed as a basis for such hypothetical questions are established by the evidence, then you should consider such expert testimony that is given in answer to such questions in connection with all other evidence in the case and give it such weight as you may deem it fairly entitled to, weighing and considering it by the light or rules given you elsewhere in this charge for the weighing of testimony.

In passing upon the credibility of the witnesses and the weight that you will give to their testimony, you should look to their manner and demeanor in testifying, look to the interest or lack of interest the witness has in testifying, his relationship to the parties in interest and the parties to this case, does he have any bias or any feeling either for

or against the Government, or for or against the defendant, what means of knowledge does the witness have of the facts he testifies to and professes to know and understand? Consider the chance and opportunity the witness has for knowing those things, and then consider, are they reasonable or unreasonable, are they probable or improbable? And by these standards and any other standard which appeals to you to be reasonable and just and proper, pass upon the credibility of each witness and the weight that you will give to his testimony.

In this case, members of the jury, you have both [fol. 92] direct and circumstantial evidence with respect to the charges against the defendant. I want to briefly explain to you the difference between direct and circumstantial evidence.

If I make a statement to you as to how I came downtown this morning, that would be direct evidence. That statement could be true or it could be false. Direct evidence can be as unreliable as any other type of evidence. On the other hand, circumstantial evidence may be as persuasive and as conclusive as the most positive direct evidence. Direct evidence is illustrated where a witness says, "I saw" this or that. The witness says, "I know it personally; I was there; I heard it." Circumstantial evidence is where a party undertakes to prove a fact as a conclusion or inference from some other fact or facts shown in evidence. Circumstantial evidence is that character of evidence which tends to prove disputed facts by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that a fact exists which is sought to be established.

There is a great deal of conflict and always has been, and probably always will be, as to the relative value of direct and circumstantial evidence. As far as the law is concerned, you can prove a case either by direct or circumstantial evidence. Circumstantial evidence is legal evidence. A jury must act upon circumstantial evidence the [fol. 93] same as if it were direct evidence, when it is satisfied by such evidence beyond a reasonable doubt.

The weight to be given to circumstantial evidence can be stated very simply, and the rule is this: to the extent that the Government's proof in this case is circumstantial, those

circumstances relied upon to convict must be consistent with guilt alone and not consistent with innocence or the possible hypothesis of either guilt or innocence. In order to justify a jury in finding a verdict of guilty based entirely or substantially on circumstantial evidence, the facts sought to be established by circumstantial evidence must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated upon the evidence. Under the law, the guilt of the defendant on both counts of the indictment may be shown by circumstantial evidence. Whether it has or not is for you to decide.

You have been told that this is an important case. Of course, it is an important case. All cases that are tried in this court are important cases to the parties, but I don't want you to limit your objectivity, which it is necessary that you maintain, by getting your mind off of the avenue of thought, by trying to determine about how important is this case. If the defendant has done the thing or things which he is charged with, he ought to be convicted; the law should be vindicated. If the defendant is not guilty, or [fol. 94] the Government has failed to prove his guilt beyond a reasonable doubt, the defendant should be acquitted.

Sitting here, as you and I do, as judges of the law and the facts, respectively, there is an obligation rests on each of us, and that is to look into this testimony objectively, with the sole purpose and object of seeing whether or not the defendant, contrary to the law, has done that which the law forbids and the indictment in this case charges. The defendant is not entitled to any sympathy, mercy, or other like considerations at your hands. The fact that the Government is prosecuting the case is a matter of no concern to you in passing upon the factual issues. As I said continually to you, members of the jury, you are to consider this evidence without being swayed by your emotions or sympathies either way, and declare a fact, and that fact is the guilt or innocence of the defendant on the charges that are submitted to you.

What happens in the event of a conviction of the defendant is a matter about which you need not be concerned. That is solely my concern. The responsibility that now rests upon you is to tell me whether or not the defendant is

guilty or innocent of the charges set forth in the indictment.

Now, use your own good judgment, members of the jury, and your sound common sense, when you retire to the jury room, discuss the case calmly; you don't represent either party any more than I do; you are here to try to find, in so far as it is possible of determination, wherein the [fol. 95] truth of this matter lies. Pass upon the case calmly and deliberately, based upon this evidence and this charge, pass upon these issues and determine the guilt or innocence of the defendant as to each count.

When you have reached a verdict, you will find a form of verdict to use, regardless of what your verdict may be. It will read this way:

"We, the jury in the above entitled cause on the trial of the indictment as to the defendant Paul Dillon, find as follows:

"We find the defendant, Paul Dillon (blank) as charged in count one of the indictment herein."

And into that blank you will write either "guilty" or "not guilty," as you find. And then you will find a similar blank and a similar finding as to count two. And then a place for your foreman to sign alone as such.

There have been a number of exhibits offered in the case. You are entitled to those exhibits when you retire to your jury room. If you want any one or all of the exhibits, you will find the bailiff at the door, your foreman will write a note and give it to the bailiff and he will bring it to me, and whatever your request is, it will be complied with.

There is a matter of law to be taken up before you retire to consider your verdict, so I am going to ask you to step outside just a moment.

[fol. 96] (The jury steps out of the court room.)

The Court: Has the Government any suggestions?

Mr. Rehm: I want to point out to the Court I thought I heard the term used here, "upon his plea of guilty." You meant to say, "on his plea of not guilty."

The Court: If I said "guilty," it was an error.

Mr. Rehm: Yes, sir.

(Reporter's Note: This correction made in the preceding transcript.)

Mr. Rehm: And I think the Court was mistaken in the Meridian fee. That is the one claim of $1,000.00. I think you some place said that $1,250.00 check was only reported as $250.00. That it left the sum of $1,250.00.

The Court: Your computation shows tax due of $189.00?

Mr. Rehm: Yes, the thousand dollar tax off that is a thousand dollar understatement.

The Court: You just claim a thousand dollar payment?

Mr. Rehm: A thousand dollar understatement, yes, sir.

Mr. Tucker: The Exhibit 4, first Packs check.

Mr. Rehm: Exhibit 4, this first Packs check, was in March.

The Court: Very well. I will correct it.

Mr. Tucker: Yes, sir.

The Court: Do you want me to make reference to the [fol. 97] offer of Defendant's Exhibit E?

Mr. Glazer: I am sure the jury understood.

Mr. Shenker: I think that was just a record. I don't think the jury even noticed. Well, they might have noticed it, but we are not using that offer of proof with the jury, your Honor. We are making no complaint. Is the Court going to correct that question of that $1250.00?

The Court: Yes. Now, let's see—the way I have my notes here.

Mr. Shenker: I am not asking that that part be corrected. I am not complaining about that.

The Court: I had it with the Plaintiff's Exhibit No. 4—what was that?

Mr. Rehm: That was the $1,000.00 check.

The Court: Was not reported?

Mr. Rehm: Thousand dollars was not reported.

The Court: And the two thousand reported?

Mr. Rehm: There was only one thousand reported.

The Court: Well, does he claim two thousand?

Mr. Rehm: You refer to Plaintiff's Exhibit 12, that is check for $1250.00, only being reported as $250.00, sir.

The Court: Well, doesn't that make two thousand?

(Further discussion.)

The Court: Unless defendant wants me to go over it again.

[fol. 98] Mr. Shenker: I would rather not.

The Court: Very well.

Mr. Shenker: If the Court please, the defendant will except to the failure of the Court to give instructions—jury instructions numbered 9 and 10, which instructions relate to the lesser offense, which it is our contention that in this case that the evidence before the Court that supports anything, if it supports anything, supports certainly the possibility of a violation, of lesser offense, and under the rules, the Federal Rules of Criminal Procedure, we feel we are entitled to it and we are prejudiced by the failure of the Court to give it.

(The said requested instructions numbered 9 and 10 are, in words and figures, as follows, to-wit:)

"Defendant's Requested Instruction No. 9.

"Under the law you may find the defendant guilty of a lesser crime than the crime charged in each count of the indictment.

"The statute (Section 145 (a) of Title 26 of the United States Code) upon which the lesser crime is based, omitting that part of the Act which does not apply in this case, reads as follows:

" 'Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations [fol. 99] made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or col-

lection of any estimated tax or tax imposed by this chapter, who wilfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor.'

"Under Count 1, if you find and believe from the evidence that on the 15th day of March, 1951, the defendant was a person required to pay a tax or to make a return, keep any records or supply any information for the purpose of the computation, assessment or collection of a tax, and if you find that the defendant knowingly and wilfully failed to pay a tax, make such a return, keep such records or supply such information at the time or times required by law, then you will find the defendant guilty of this lesser crime, under Count 1 of the indictment.

"Under Count II, if you find and believe from the evidence that on or about the 17th day of March, 1952, the defendant was a person required to pay a tax or to make a return, keep any records or supply any information for the purpose of the computation, assessment or collection of a tax, and if you find that the defendant [fol. 100] knowingly and wilfully failed to pay a tax, make such a return, keep such records or supply such information at the time or times required by law, then you will find the defendant guilty of this lesser crime, under Count II of the indictment."

"Defendant's Requested Instruction No. 10.

"Under the law you may find the defendant guilty of a lesser crime than the crime charged in each count of the indictment.

"The statute upon which the lesser crime is based, omitting that part of the Act which does not apply in this case, reads as follows:

" 'Whenever any person * * * delivers or discloses to a collector * * * any false or fraudulent * * * return * * * with intent to defeat or evade the * * * assessment intended to be made, shall be guilty of a misdemeanor.'

"Under Count I, if you find and believe from the evidence that the defendant delivered, caused to be delivered

or disclosed to the Collector of Internal Revenue for the First Collection District of Missouri, a false joint income tax return with intent to defeat or evade the assessment intended to be made, you will find him guilty of this lesser crime.

[fol. 101] "Under Count II, if you find and believe from the evidence that the defendant delivered, caused to be delivered or disclosed to the Collector of Internal Revenue for the First Collection District of Missouri, a false individual income tax return with intent to defeat or evade the assessment intended to be made, you will find him guilty of this lesser crime."

Mr. Shenker: We object to the failure of the Court to give defendant's requested instruction No. 5 in this case.

(The said defendant's requested instruction No. 5 is, in words and figures, as follows, to-wit:)

"Defendant's Requested Instruction No. 5.

"You are instructed that the mere filing of a false or fraudulent income tax return, or the wilful failure to pay an income tax due, are not of themselves sufficient to constitute an offense under this indictment; that before you can convict the defendant under this indictment it is incumbent upon the government not only to prove beyond a reasonable doubt that the defendant filed a false and fraudulent income tax return, but they must go further and prove beyond a reasonable doubt that the defendant committed some wilful and fraudulent act or acts, the [fol. 102] likely effect of which would be to mislead or to conceal from the taxing officers the amount of income upon which the tax is levied, and if the government fails to prove all of the aforesaid, including wilful and fraudulent act or acts to mislead and to conceal, the defendant should be acquitted."

Mr. Shenker: That this instruction distinguishes the offense under Section 145 (a) and 145 (b), in so far as the fees were concerned, for the reason there is no showing here of fraudulent acts and which would be calculated to mislead for the purpose of evading or attempting to evade payment of the due tax, and there is foundation

under the evidence in this case that we would be entitled to have that theory presented to the jury.

It is contended that the Court's definition of the words "wilfully and knowingly and feloniously," that as given by the Court in the charge, and they are accompanied with the question and the definition of intent, which is given in this case, because that intent must be a specific intent, in so far as an income tax evasion is concerned, and not just a general intent for that purpose. Now, if that definition that was given of intent was taken in conjunction with "wilfully and knowingly and feloniously," as given by the Court, it appears at their request.

We are going to object, if the Court please, to the [fol. 103] Court's comment to the jury pertaining to the statement singling out the question that was asked by counsel as to whether payments were made to the associate counsel Mize by the defendant, the reason being that from the evidence—that we are objecting to the Court's comment as to singling out the question that was asked by the defendant's counsel from the witnesses pertaining to payments to associate counsel Mize in Mississippi, wherein the Court said that there was no evidence of any sums being paid to another counsel. I submit that, from the facts as given, that from the facts that were given, there was reasonable inference that could be drawn from the evidence that Mize was paid, and it is for the jury to determine whether he received a part of that or not, and that the comment pertaining to Mize was distinctly one of the comments that were one-sided and to the detriment and prejudice of the defendant.

Now, in so far as the intent, the Court giving the instruction on intent, that defendant is guilty, that evidence as to what—we contend that the Court's instruction, that it should show the state of mind should have been to file a false and fraudulent tax return with an intent to evade tax and not just the state of mind so far as the violation was concerned.

Then I have one more here pertaining to—I will object to the Court's failure to instruct the jury that the Government is bound by the statement that was testified to [fol. 104] by Agent Wallace as to what Mr. Dillon told him pertaining to the——

The Court: I don't recall any request.

Mr. Shenker: We have not submitted a written request. We are only calling that to the Court's attention. That it is the defendant's contention that when Agent Wallace testified that Mr. Dillon told him that this book recorded the fees substantially which he considered his, and that that is—the Government is bound by that answer, because it is in the form of a statement of their—because in the absence of any contradictory evidence being offered, that they are bound by that statement.

The Court: Is that all?

Mr. Shenker: Yes.

[fol. 105] The defendant also requested the following instructions:

Defendant's Requested Instruction No. 1.

Under our system of laws men are not punished criminally for mere mistakes, mere mismanagement, mere carelessness, or mere errors of judgment. They are punished only for intentional wrongdoing. The defendant here is not on trial for errors of judgment or mistakes or mismanagement, but is on trial for a criminal offense, and an essential element of that offense is an evil or criminal intent, which it is incumbent upon the Government to prove to your satisfaction and beyond a reasonable doubt before you will be warranted in returning a verdict of guilty.

[fol. 106] Defendant's Requested Instruction No. 2.

A substantial understatement of income is only one element of the crime charged in the indictment. It in itself is not sufficient to authorize a conviction.

[fol. 107] Defendant's Requested Instruction No. 3.

The Court instructs the jury that the defendant cannot be held criminally responsible for filing any of the returns mentioned in the evidence for the years 1950 and 1951, if the Government has failed to prove beyond all reasonable doubt that the return was false and fraudulent, that the defendant knew it was false and fraudulent, and that such filing was made wilfully and with knowledge that it was false and fraudulent and with intent to evade taxes. There is no presumption of guilt that may be drawn from the act

itself—both knowledge and wilfulness must be established by the Government by independent proof.

[fol. 108] Defendant's Requested Instruction No. 11.

The ascertainment of the amount of the net taxable income of a taxpayer is the ascertainment of a fact. Real facts, and not bookkeeping entries, give rise to income. Books of account are no more than evidential. They are neither indispensable nor conclusive. The decision must rest upon the actual facts.

[fol. 109] ———

(At this point, 12:16 p. m., the jury retired to their jury room to consider of their verdict.)

The Court: The court will be in recess.

(At 12:42 p. m., the jury returned to the court room, and the following proceedings were had:)

The Court: Have you concluded your work in this case?

Juror Aubuchon: We have, your Honor.

The Court: Will you give your verdict to the bailiff, please?

The clerk will read the verdict.

(Thereupon the clerk read aloud the verdict returned by the jury, which said verdict is, in words and figures, as follows:)

"In the District Court of the United States,
Eastern Division, Eastern District
of Missouri.

"United States of America, Plaintiff,

vs. No. 27678 (2).

Paul Dillon, Defendant.

"Jury Verdict.

"We, the jury in the above entitled cause on the trial of the indictment as to the defendant Paul Dillon, find as follows:

[fol. 110] "We find the defendant, Paul Dillon Guilty as charged in count one of the indictment herein.

"We find the defendant, Paul Dillon Guilty as charged in count two of the indictment herein.

"Claude J. Aubuchon,
Foreman.

Dated March 16, 1954."

[fol. 111] Defendant's Motions for Judgment of Acquittal, or, in the Alternative, for a New Trial.

(Filed in U. S. District Court on March 22, 1954.)

I.

Motion for Judgment of Acquittal.

Defendant renews the motion for judgment of acquittal filed at the close of all the evidence and moves the Court to set aside the verdict of guilty on each count of the indictment and to enter a judgment of acquittal on each count of the indictment for the reason that the evidence is insufficient to sustain a conviction.

II.

Motion for a New Trial.

Defendant, in the event this Court overrules his renewed motion for judgment of acquittal, moves the Court to set aside the verdict of guilty on each count of the indictment and to grant him a new trial, and as grounds for this motion states:

(1) The Court erred in overruling defendant's motion for judgment of acquittal filed at the close of all the evidence.

(2) The verdict is contrary to the weight of the evidence.

(3) The Court erred in overruling objections of the defendant to testimony and exhibits offered by the plaintiff

and in admitting into evidence, over the objection of the defendant, irrelevant, immaterial and incompetent evidence offered by the plaintiff.

[fol. 112] (4) The Court erred in admitting into evidence checks drawn by Tom Packs for the reason that no proper foundation was laid for the introduction of these exhibits as there was no showing that these checks represented income to the defendant.

(5) The Court erred in admitting into evidence testimony of Internal Revenue Agent Wallace as to the alleged total income of the defendant for the years in question for the reason that this testimony was incompetent and no proper foundation was laid for its introduction and was a conclusion not based on evidence in the case.

(6) The Court erred in overruling defendant's motion for a mistrial based on newspaper articles about this trial on March 15 and March 16, 1954 for the reason that these articles presented to the jury matters which would have been incompetent as evidence, disparaged the character of the defendant, and referred to defendant's failure to testify.

(7) The Court erred in charging the jury and in refusing to charge the jury as requested by the defendant for the reasons called to the Court's attention in defendant's exception to the charge.

(8) The Court erred in charging the jury that there was no evidence in the case that the defendant split the Broadhead fee with another attorney for the reason that this part of the charge was one sided and amounted to advocacy against the defendant.

(9) The Court erred in refusing to charge the jury as to lesser offenses under Section 145 (a) and Section 3616 (a) as requested by the defendant.

MORRIS A. SHENKER,
408 Olive Street,
Attorney for Defendant.

[fol. 112a] Order overruling deft's motion for judgment of acquittal, or, in the alternative, for a new trial.

Clerk's Docket Entry, March 22, 1954.

Deft's motion for judgment of acquittal, or, in the alternative, for a new trial, filed, argued, submitted and overruled.

[fol. 113] (Judgment and Sentence.)

(Filed in U. S. District Court on March 22, 1954.)

United States District Court
for the
Eastern District of Missouri Eastern Division.

United States of America
v.
Paul Dillon.
} No. 27678 (2)

On this 22nd day of March, 1954, came the attorney for the government and the defendant appeared in person and with Morris A. Shenker, his attorney.

It is adjudged that the defendant has been convicted upon his plea of not guilty and verdict of guilty, heretofore returned by jury of the offenses of knowingly, willfully, unlawfully and feloniously attempting to defeat and evade a large part of the income tax due and owing to the United States of America for the calendar year 1950 under count one and for the calendar year 1951 under count two of the indictment herein, as charged in cts. 1 and 2 of indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of fifteen

(15) months as to and under the charge as contained in each of counts one and two of the indictment herein; such terms of imprisonment to begin, run, and terminate concurrently; and further, as to and under the charge as contained in count one of the indictment herein, that he the said defendant make his fine to the United States of America by the payment of the sum of Twenty-five Hundred Dollars ($2500.00) and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It is adjudged that defendant be granted stay of execution on judgment and sentence to March 29, 1954, at 10 a. m. and defendant released on present bond until said date.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

RUBEY M. HULEN,
United States District Judge.

JAMES J. O'CONNOR,
Clerk.

[fol. 114] Notice of Appeal.

(Filed in U. S. District Court on March 23, 1954.)

In the United States District Court
Eastern District of Missouri
Eastern Division.

United States of America,	Plaintiff,	No. 27678 (2)
v.		
Paul Dillon,	Defendant.	

1. Name and address of appellant: Paul Dillon, 4501 Maryland, St. Louis, Missouri.

2. Name and address of appellant's attorney: Morris A. Shenker, 408 Olive Street, St. Louis, Missouri.

3. Offenses charged:

Count I of the indictment allegedly charged an attempt to defeat and evade income tax for the calendar year 1950 contrary to Section 145 (b), Title 26, United States Code.

Count II of the indictment allegedly charged an attempt to defeat and evade income tax for the calendar year 1951 contrary to Section 145 (b), Title 26, United States Code.

4. Concise statement of Judgment:

Judgment of March 22, 1954, adjudging that the defendant has been convicted upon his plea of not guilty and a jury verdict of guilty and committing the defendant to imprisonment for a period of 15 months and to pay a fine of $2,500.00 under Count I of the indictment and committing the defendant to imprisonment for a period of 15 months under Count II of the indictment, the terms of imprisonment to run concurrently.

5. Defendant is on bail under a one week stay of execution of the judgment expiring on March 29, 1954.

[fol. 115] I, the above-named appellant, Paul Dillon, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the above stated judgment of March 22, 1954.

Dated: March 23, 1954.

PAUL DILLON,
Appellant.

MORRIS A. SHENKER,
408 Olive Street,
St. Louis, Missouri,
Attorney for Appellant.

[fol. 116] (Memorandum of District Court on denying Motion of Bail to Defendant.)

(Filed in U. S. District Court on March 29, 1954.)

We state our reasons for denying bail pending appeal by the defendant, as called for by Rule 38 (c), Federal Rules of Criminal Procedure.

Defendant is a practicing lawyer, with a far-reaching reputation. He was convicted on two counts for filing a fraudulent tax return with intent to defeat taxes due on his income as a lawyer by way of attorney's fees. Punishment assessed under Count II was made to run concurrent with punishment assessed under Count I.

The motion for new trial does not in our judgment present any substantial questions. As we construe Rule 46 (a) (2):

> "* * * the question should be substantial in the sense of fairly doubtful and in the sense also that it is not trivial or merely technical but has substantial importance to the merits; finding this, bail remains an appeal to the discretion of the court." See Williamson vs. United States (2nd Cir.), 184 F. 2d 280, an opinion by Mr. Justice Jackson.

The motion for a new trial contains nine assignments. Assignments 1, 2, 3 and 7 are plainly too general to raise any question. The assignment referring to Count I reads:

> "The Court erred in charging the jury that there was no evidence in the case that the defendant split the Broadhead fee with another attorney for the reason that this part of the charge was one sided and amounted to advocacy against the defendant."

The Government's witnesses testified that the unreported income, forming the basis of the Government's case [fol. 117] on Count I, was paid to defendant as attorney's fee for representing one Broadhead in a criminal tax case in Mississippi. Defendant had a book in which he purportedly kept a record of fees collected. There is no issue but what defendant received the money which the Government claims is unreported taxable income. The unreported income was not entered in the fee book kept by the de-

fendant. Defendant's counsel by questions tried to develop that the defendant had taken another attorney in with him on the Broadhead case and gave him the unreported part of the Broadhead fee. The most that Broadhead would testify to was that the second lawyer was in court with defendant when the case was called and was in court when he entered his plea of guilty. Broadhead denied he employed this attorney and said he knew nothing of any fee arrangement between defendant and the attorney. There is no other evidence in the record on the subject. Defendant's fee record book showed a payment to a lawyer on another matter and it was used as a deduction in arriving at the tax due.

Defendant, a member of the Bar of this Court, and facing a grave charge affecting his honor and right to continue the practice of his profession, did not take the stand or offer any testimony.

With this state of the record defendant's counsel argued strenuously before the Jury that defendant had paid the unreported income to the lawyer who appeared with him in the court in Mississippi in the Broadhead case, and that defendant should be acquitted on that ground. Since there was no evidence that defendant had paid any sum to any other lawyer, to help him represent Broadhead, to dispel any confusion created by defendant's counsel's argument we told the Jury in our charge that there was no evidence of any money being paid by defendant to the lawyer in question. We also told the Jury that they were the sole judges of the facts, the credibility of this witness and the weight they would give to his testimony.

Defendant had the privilege of not taking the stand in this criminal case, but he cannot escape the eventual con-
[fol. 118] clusion by the Court, on motion for new trial, that if he had paid the unreported income to a lawyer as a part of his fee, he would have taken the stand and said so. Not having done so, and making no other showing of such a position, beyond some questions of his counsel, the counsel was outside of the record in his argument. In fact such an argument borders on an attempt to mislead the jury, contrary to part of the oath taken by a lawyer before the Bar of this Court. We do not comment on defend-

ant's failure to keep a record on his counsel's theory of income and disbursements.

Assignment (4) refers to the second count. It reads:

> "The Court erred in submitting into evidence checks drawn by Tom Packs for the reason that no proper foundation was laid for the introduction of these exhibits as there was no showing that these checks represented income to the defendant."

As on Count I no claim is made that defendant did not receive the funds in issue, but defendant disputes by argument that they were income.

Some of the checks were marked "fees" and "legal fees." Some have no mark of purpose. All were made payable to and bore defendant's endorsement. All had been cashed. Defendant's memorandum book, in which he entered his attorney's fees, was identified by a Government agent. The agent testified to defendant's declaration to him as to what use he made of the book. The amounts of some of Tom Packs' checks were entered in the fee book as fees from Tom Packs. Some were not entered. The unentered amounts were not included in the tax return. Even in a case of unexplained funds the rule is:

> "Evidence of unexplained funds or property in the hands of a taxpayer establishes a prima facie case of understatement of income. It is then incumbent on the defendant to overcome the logical inferences to be drawn from the facts proved." (Roberts vs. Commissioner of Internal Revenue (7th Cir.), 176 F. 2d 217, 220.)

The Eighth Circuit Court said, in Gleckman vs. United States, 80 F. 2d 394, 401:

> "Taxation is a practical matter and taxpayers do not terminate all duty to pay income tax by willfully failing to keep account of their income."

[fol. 119] The defendant being in an occupation, and having regular income from fees, and the funds on the Packs checks having been paid to the defendant and part of the checks being marked "fees" and "legal fees," and part of

the proceeds of the checks shown in defendant's fee book, and part not, and those not shown in the fee book not being reported as taxable income, the Government has made a prima facie case as to such unreported income. On the second count defendant is faced by the rule announced by the Supreme Court in the case of Rossi vs. United States, 289 U. S. 89:

> "The general principle, and we think the correct one, underlying the foregoing decisions is that it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control."

Which has been carried over into tax cases. See Gariepy vs. United States (6th Cir.), 189 F. 2d 459, 463 [9]. See also Clark vs. United States (8th Cir., March 19, 1954, Case No. 14,652):

> "The existence of unreported income may be demonstrated by any practical method of proof that is available on the circumstances of the particular situation. Cf. Burka v. Commissioner, 4 Cir., 179 F. 2d 483, 485. And it is not necessary, in order to make a case of tax evasion, that the exact amount of such income should be established. United States v. Johnson, 319 U. S. 503, 517, 63 S. Ct. 1233, 87 L. Ed. 1546. Nor is it incumbent upon the Government, in making a prima facie case of evasion to prove the non-existence of any other deductions than those which the taxpayer has claimed in his return. United States v. Link, 3 Cir., 202 F. 2d 592, 593, 594."

Order.

Application for bail pending appeal is denied.

RUBEY M. HULEN,
Judge.

[fol. 120] (Docket Entries in United States District Court.)

United States of America

vs.

Paul Dillon.

No. 27678 (2).

1953

November 13—Indictment filed.

November 16—On oral motion of U. S. Atty., order filed fixing appearance bond of deft. in penal sum of $2,000.00 to be taken before U. S. Commissioner, and made returnable forthwith, etc. On praecipe filed by U. S. Atty., capias issued for deft. returnable forthwith.

Appearance bond of deft. in penal sum of $2,000.00 as given before and approved by U. S. Commissioner and made returnable in Court No. 2, on November 23, 1953, and thereafter filed.

November 17—Warrant showing Marshal's return thereon (executed), filed.

November 23—Deft. appears with Wm. O'Toole, Esq., who informs the Court deft. has retained Morris Shenker as his atty. herein. On oral motion, deft. granted to December 14, 1953, to file any contemplated motions, any such motions so filed for hearing December 22, 1953. Cause passed for arraignment to December 22, 1953. (Moore, J.)

December 14—Separate motions of deft. (1) to dismiss; (2) to suppress evidence; (3) for bill of particulars, and (4) for discovery and inspection, with requests for oral argument filed.

December 15—Deft's motion to strike with request for oral argument, filed.

December 22—Motions of deft. (1) to dismiss, (2) to suppress, (3) for bill of particulars, (4) for discovery and inspection and (5) to strike, passed for hearing to December 23, 1953.

December 23—Deft. appears with Morris Shenker his atty. Separate motions of deft. to dismiss and suppress,

argued, submitted and overruled. Motions of deft. for bill of particulars and for discovery and inspection, argued, submitted and overruled on condition that Govt. supply information in question. Deft's motion to strike, argued, submitted and overruled. On arraignment deft. enters plea of Not Guilty to indictment. Cause set for trial on March 3, 1954. (Hulen, J.)

1954

February 5—Subpoena to Produce (Flinn) showing Marshal's return thereon (executed), filed.

February 16—Pltff's bill of particulars, filed.

February 25—By agreement and with leave, order heretofore entered setting cause for trial March 3, 1954, vacated and cause reset for trial to March 15, 1954.

March 4—Transcript of testimony at hearing before Court December 23, 1953 on deft's motions to dismiss and to suppress evidence, filed by Court Reporter of Court 2.

March 15—Deft. appears with Morris Shenker and Sidney Glazer, his attys. Deft. having heretofore entered plea of not guilty to each of counts 1 and 2 of ind. and parties announcing ready for trial, jury empaneled and sworn. Introduction of evidence on behalf of the Govt. commenced and concluded. Oral motion of deft. for judgment of acquittal at close of Govt's. case made, submitted and overruled. Deft. offering no evidence in his behalf and hour of adjournment having arrived, further proceedings postponed until tomorrow at 10:00 AM.

[fol. 121] 1954

March 16—Again come parties and jury; whereupon said jury after hearing arguments of counsel and being charged by the Court retires to consider its verdict, which verdict it afterwards returns into Court finding deft. guilty as charged in each of counts 1 and 2 of ind. On oral motion of deft., jury polled and individually acknowledges in the affirmative such verdict. Imposition of sentence deferred to March 22, 1954 and deft. released on present bond. Deft. granted to March 22, 1954, to file any contemplated motions such motions docketed for hearing on March 22, 1954.

March 22—Deft's motion for judgment of acquittal, or in the alternative for a new trial, filed, argued, submitted and overruled. Deft. appears with Morris Shenker his atty., for imposition of sentence under verdict of guilty heretofore returned by jury to each of counts 1 and 2 of ind. Deft. under each of counts 1 and 2 committed to custody of Atty. Genl. for imprisonment for a term of 15 months, such terms to run concurrently, and punishment of deft. under count 1 further fixed at a fine of $2,500.00 to stand committed, etc. On oral motion of deft. for suspension of judgment and sentence for probation, made, submitted and overruled. On oral application, deft. granted stay of execution of judgment and sentence to March 29, 1954 at 10:00 AM, and deft. released on present bond until said date. (Hulen, J.)

March 23—Deft's notice of appeal to U. S. Court of Appeals, 8th Circuit, from judgment and sentence entered herein against him March 22, 1954, filed in triplicate and one copy thereof, together with certificate of docket entries in cause forthwith transmitted by Clerk of this Court to Clerk of aforesaid appellate court. Copy of notice of appeal transmitted by Clerk of this Court to U. S. Attorney.

I, James J. O'Connor, Clerk, U. S. District Court, Eastern District of Missouri, do hereby certify the above and foregoing is a true and correct copy of the essential docket entries in cause.

JAMES J. O'CONNOR,
Clerk, U. S. District Court,
By JOHN J. JARVIS,
Deputy Clerk.

[fol. 122] (Order of United States Court of Appeals for the Eighth Circuit granting Bail to Appellant pending Appeal, etc.)

United States Court of Appeals
for the
Eighth Circuit.

No. 15048—September Term, 1953.

Wednesday, April 14, 1954.

Paul Dillon,	Appellant,	Appeal from the United States District Court for the Eastern District of Missouri.
vs.		
United States of America.		

In this cause there has been filed motion of appellant for bail pending the determination of his appeal in this Court, memorandum of appellee in opposition thereto, and reply memorandum of appellant in support of motion for bail, and, after due consideration, It is now here Ordered by the Court that Paul Dillon, appellant herein, be released from custody and admitted to bail pending the determination of his appeal in this Court, upon executing and filing with the Clerk of this Court a bond, with good and sufficient surety, or sureties, in the lawful sum of Five Thousand ($5000.00) Dollars, conditioned to provide for the full and prompt compliance by the said Paul Dillon with the orders and judgment of this Court. The Bond to run to the United States of America and to be approved by the Clerk or Deputy Clerk of this Court. When the Bond specified herein is approved and filed with the Clerk, but not before, the appellant Paul Dillon shall be enlarged on bail to the extent and subject to the conditions provided in this order and such further order or orders as may be entered by this Court in this cause.

April 14, 1954.

[fol. 111] IN UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15,048

PAUL DILLON, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Eastern District of Missouri

Morris A. Shenker and Sidney M. Glazer for Appellant.

Charles H. Rehm, Assistant United States Attorney (Harry Richards, United States Attorney, and Robert C. Tucker, Assistant United States Attorney, were with him on the brief), for Appellee.

OPINION—January 5, 1955

Before Gardner, Chief Judge, and Collet and Van Oosterhout, Circuit Judges

[fol. 112] COLLET, Circuit Judge:

The defendant was convicted by a jury of attempting to defeat and evade the payment of income taxes for the years 1950 and 1951. The Government presented evidence showing that defendant's receipts for 1950 were substantially in excess of the amount reported for that year, and that his receipts for 1951 were approximately $5,700.00 more than reported. The defendant did not testify. Counsel sought to convince the jury that the Government's evidence was consistent with the hypothesis that all of the money shown to have been received by defendant was not income to him. He was an attorney. The argument was made that probably the portion of the receipts which was not reported as income went to associate counsel as fees, or did not belong to defendant, or that at least the Government had not shown the contrary. The court, in its charge to the jury, referring to that argument, instructed the jury that the questions of counsel which may have assumed that possibility were not

evidence and that as the court understood the testimony, there was no evidence that the defendant had shared any fees with anyone. That part of the charge is assigned as error here.

As to this first assignment, it is argued that the court's charge was "one-sided" and constituted "advocacy against the defendant." The charge included the usual cautionary admonition that anything contained in it which might be construed by the jury as a comment on the evidence which differed from the jury's understanding of the evidence should be disregarded—that it was the jury's sole province to find the facts. The charge was not argumentative and did not go beyond pointing out the factual situation portrayed by the evidence. The situation here was very dif-
[fol. 113] ferent from that in the cases of *Boatright* v. *United States*, 105 F. 2d 737, and *Billeci* v. *United States*, 184 F. 2d 394, cited by defendant.

Error is assigned on account of the admission as evidence of seven checks payable and delivered to defendant during the years covered by the indictment. Defendant contends that there was no foundation laid for the introduction of those checks in evidence, because there was no testimony to the effect that the checks represented taxable income to the defendant. Two of them were marked "legal services", two were marked "fees", and three were not marked. The gravamen of defendant's contention is that before evidence of this nature should be admitted it should be first shown that the money was received under such circumstances as to "strongly" indicate it was actually taxable income, and that the burden of proof or the burden of going forward with the evidence to show that it was not income should not be shifted to the defendant, absent such initial showing. If the word "fairly" be substituted for "strongly", the principle is correct. If the foundation or initial evidence does fairly indicate that the receipts were income, the Government is not required initially to adduce positive evidence to support a negative hypothesis that it was not money received for someone else or that it was not received for some purpose which would prevent it from being income to the person to whom it was paid. The rule is not a new one. The explanation of the reason supporting it and the limitations of its application were stated by Mr. Justice Cardozo in *Morrison*

v. *California*, 291 U. S. 82, 88, and reiterated by Chief Justice Vinson in *United States* v. *Fleischman*, 339 U. S. 349, 360. For a transfer of the burden—"experience must teach that the evidence held to be inculpatory has at least a sinister significance." 291 U. S. 82, 90. It may be said with con-
[fol. 114] siderable force and logic, as defendant now says, "that in view of the nature of the legal profession the mere receipt of money does not represent income," and that the "sinister significance" that it was income does not arise in an income tax prosecution from its receipt alone. But there is another exception so closely related that for practical purposes, at least under circumstances such as these, it is a part and parcel of the exception stated. The latter is—"if this [the sinister significance] be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity of knowledge. * * * The decisive considerations are too variable, too much distinctions of degree, too dependent in last analysis upon a common sense estimate of fairness or of facilities of proof, to be crowded into a formula. One can do no more than adumbrate them; sharper definition must await the specific case as it arises." 291 U. S. 82, 91.

In the present case the Internal Revenue agent assigned to investigate this case prior to the indictment appears to have made inquiry of defendant seeking to determine if all of the amount of the checks in question did represent income or whether part was received for some other purpose, and that defendant declined to give any information other than that all of it was not income, which latter the agent was unable to substantiate. Under these circumstances the exception to the general rule that the burden of making an explanation will not ordinarily be shifted to the defendant in a criminal case applies, and the problem of the trial court became one of evaluating the circumstances and determining whether in fairness to both parties the evidence should be admitted upon the initial showing and leave to the defendant the opportunity to dispell the inference which could reasonably follow, absent explanation.

[fol. 115] Great care should be observed in the exercise of judicial discretion to the end that no shifting of the burden placed upon the prosecution to prove guilt result in requiring to any degree or extent that a defendant prove his in-

nocence. The burden of proof must remain on the prosecution to establish guilt. The administration of justice is not a game of chess or of hide-and-seek. It is a search for truth and the application of the law to the true facts in order that substantial justice be done under the law. The prosecution must not be permitted to introduce evidence which is not so indicative of guilt as to fairly point to guilt and cast the burden on the defendant to disprove an unfair implication or inference. One charged with a crime may testify in his own behalf or not, as he chooses. In making the choice he must weigh the considerations in favor of a decision not to testify against the possibility or probability that evidence fairly adduced against him will be accepted at its face value with damaging results. If he decides not to explain, when absent an explanation he will appear to be guilty, he shall not be criticized for his choice. But if the evidence is of such a nature that it fairly indicates guilt, a defendant may not be heard to complain that an explanation reposing, comparatively speaking, particularly and peculiarly in him, has not been given by another. We have condemned the use of evidence which in fairness should not under the circumstances have been admitted and the burden cast upon the defendant to explain or suffer the possible consequences. But that is not the situation here. The checks were made payable to the defendant. They were either marked "fees" or "legal services" or were given to him under circumstances indicative that they were for legal services. They were all endorsed by defendant and cashed. The discretion involved in determining that this evidence was fairly indicative of income received by defendant, and permitting its introduction in evidence, was not abused in this instance.

[fol. 116] A case involving a factual situation requiring a converse ruling will illustrate the limitation of the exception. In *Kirsch* v. *United States*, 174 F. 2d 595, the defendant was charged with having received income in an amount equal to his bank deposits. The Government's witness was permitted to assume that all of the bank deposits represented income, when the Government's investigation had disclosed that a large part of those deposits represented pay checks cashed for customers out of funds theretofore drawn from the bank for that purpose. Under those circumstances it was held unfair to admit the evidence of total deposits,

characterized as income, and permit the inference from the proof of the amount of the deposits that all of those deposits constituted income, thereby casting the burden on defendant to disprove that inference.

It is asserted that the court committed reversible error in permitting the revenue agent to testify that Exhibits 4 and 10, two of the checks heretofore referred to, were not recorded in defendant's records and that Exhibits 5, 6, 8, and 9, four of those checks, were understated in those records. The complaint that is made is that the witness was testifying as an expert, that expert testimony is only admissible when the facts are so complicated that expert testimony is needed to assist the jury, that the defendant's records and the facts to be gleaned therefrom were not complicated and the jury did not need expert guidance. The argument is ingenious but lacks substance and merit. The records were in evidence before the jury. They were not voluminous. The cash receipt book, which the witness was familiar with, was handed to him and he was asked whether Exhibits 4 and 10 were recorded therein. Over defendant's objection that the question called for "a conclusion and opinion and comparison of documents," and that it had not been shown that the checks represented income, the witness [fol. 117] answered that Exhibits 4 and 10 were not recorded. When asked about Exhibits 5, 6, 8, and 9, he testified that Exhibits 5 and 6, which were in evidence, totaled $4,500.00 and were recorded in the record as $1,500.00; that Exhibits 8 and 9, also in evidence, totaled $3,500.00 and were entered in the books as $1,500.00. These records were not very legible or orderly. The witness had made a calculation of the total receipts of the defendant. If the records were so abstruse as not to be readily understandable by the jury, an explanation was appropriate. But if it be assumed that the records were not of such a nature as to justify expert testimony to decipher or simplify them, then the checks and the records clearly showed for themselves what they alluded to and there was no possible prejudice in the witness so stating. And if, as defendant contends, the latter be the situation, the witness' testimony was admissible for the purpose of explaining how his total figure of defendant's income was arrived at from these books. There was no prejudicial error in permitting this testimony.

Defendant was charged with a felony under § 145 (b), 26 U. S. C. A. § 145 (b). He requested an instruction that the jury might find him guilty of a lesser offense—specifically, a misdemeanor under § 145 (a), 26 U. S. C. A. § 145 (a), or § 3616 (a), 26 U. S. C. A. § 3616 (a). The request was denied. He contends that the lesser offenses defined in § 145 (a) and § 3616 (a) are included in the greater defined by § 145 (b) and that under Rule 31(c) of the Federal Rules of Criminal Procedure,[1] he was entitled [fol. 118] to the instruction. The pertinent portions of § 145 (a), § 145 (b), and § 3616 (a) are quoted in the footnote.[2]

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[1] "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

Fed. Rules Cr. Proc. rule 31 (c), 18 U. S. C. A.

[2] § 145 (a). "Failure to file returns, submit information, or pay tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, * * * be guilty of a misdemeanor * * *."

(b) "Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, * * * be guilty of a felony * * *."

26 U. S. C. A. § 145 (a) and (b).

§ 3616. Penalties.

"Whenever any person—

(a) False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation,

As stated in *Spies* v. *United States,* 317 U. S. 492, 493, "Section 145 (a) makes, among other things, willful failure to pay a tax *or* make a return • • • a misdemeanor. Section 145 (b) makes a willful attempt in any manner to evade or defeat any tax • • • a felony." The indictment did not charge, nor did the evidence show, that defendant merely failed to pay a tax or failed to make a return. On the contrary, the evidence showed that a return was filed and a tax was paid. No evidence was offered that defendant failed to file a return or to show the willful failure to pay the tax when due, except insofar as willfulness was involved in the charged willful and felonious attempt to evade the payment of taxes owed. Hence the universal rule that it is not error to fail to instruct on an offense not presented by the evidence applies. There consequently was no error in [fol. 119] failing to instruct that defendant might have been convicted of either of the misdemeanors defined by § 145 (a), of willful failure to pay a tax when due or willful failure to file a return.

As the quoted portion of § 3616 (a) shows, that section makes a misdemeanor the filing of a false or fraudulent list or return with intent to defeat or evade the assessment of taxes. Was this misdemeanor included in the felony defined by § 145 (b)? Defendant cites *Kirsch* v. *United States,* 174 F. 2d 595, as authority that it was.

The question of whether evidence which the defendant *claimed* only showed a violation of § 145 (a), coupled with evidence of a violation of § 3616 (a) of filing a false or fraudulent list or return, would sustain a conviction of feloniously attempting to evade or defeat the payment of a tax under § 145 (b), was presented in *Kirsch* v. *United States.* Upon the record in that case the question was found to be abstract because, as was stated in the opinion, "*If* there was need for proof of affirmative acts other than those defined as misdemeanors in Sections 3616 (a) and 145 (a) in furtherance of an attempt to evade taxes, it is

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enumeration, or assessment intended to be made • • • he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

26 U. S. C. A. § 3616 (a).

contained in the record." The present question not being presented by the record in the *Kirsch* case, it was not decided. Now we are confronted with the problem of determining whether § 3616 (a) really applies to income tax returns. If it does not apply to income tax violations, the offense it defines was not included in the felony charge based on § 145 (b) and Rule 31 (c) did not authorize a conviction under the felony charge of the lesser offense defined by § 3616 (a). And, if that be true, an instruction authorizing a conviction for the misdemeanor, not embraced in the felony charge, was not appropriate. The question has not been passed upon directly. We take note of cases cited by defendant.

[fol. 120] In *Cave* v. *United States,* 159 F. 2d 464, this court sustained a conviction under § 145 (b) upon proof that the defendant willfully filed a false and fraudulent return. No exceptions were taken to the instructions at the time of trial. On appeal, complaint was made of the instructions on the ground that they were so indefinite, inconsistent and prejudicial as to require reversal, although no exceptions were taken. The precise point now presented, that the defendant was entitled to an instruction on the misdemeanor defined in § 3616 (a) in the event the jury found a false return had been filed but failed to find that it was willfully false, was not raised. In *Myres* v. *United States,* 174 F. 2d 329, the situation was the same.

In *Taylor* v. *United States,* 179 F. 2d 640, on an appeal from a denial of habeas corpus, one convicted under § 145 (b) contended that § 145 (b) had been repealed by implication by § 3616 (a). In that case note was not taken of the fact that § 145 (b) involves willfulness while § 3616 does not. The Court rested its denial of the contention on the fact that § 3616 (a) was originally enacted long prior to the enactment of § 145 (b) and could not have repealed by implication § 145 (b). Our attention has not been directed to any other reported cases in which there was any contention that § 3616 (a) applied to income tax violations.

The language of § 3616 (a), which appears under the heading "Penalties", differs from that customarily applied to income tax returns. Its juxtaposition to statutes relating to the duty of collectors to canvass their districts for taxable persons and objects, 26 U. S. C. A. § 3600; the

entry of premises for examination of taxable objects during the day or night (§ 3601); search warrants (§ 3602); the making of a "*list* or return" by a taxpayer of articles, objects, goods, wares and merchandise made or sold, charged [fol. 121] with a tax, the rates of the tax and aggregate amount thereof, and if such list is not made by the taxpayer, the list should be made by the collector (§ 3611); the provision for penalties for failure to file "returns or lists" (§ 3612) without reference to similar penalties found in connection with that part of the code relating specifically to income taxes; rewards to informers with respect to illegally produced petroleum (§ 3617); all would appear to indicate a relationship of § 3616 to subjects other than income taxes. The fact, as pointed out in the *Taylor* case, 179 F. 2d 640, that § 3616 was enacted long prior to § 145 and does provide a penalty for submitting a false return (or list) without willfulness, and none of the later prohibitions of § 145 do so, would be some indication that the existence and application of the older § 3616 to all tax matters, including income tax returns, was recognized by Congress when § 145 was enacted, and that the reason for not making provision in § 145 for a penalty for nonwillful filing of a false return was to avoid duplicating § 3616 (a), if Congress had not indicated such was not the intention when it revised the entire tax code by the Internal Revenue Code of 1954.

When the Internal Revenue Code was revised in 1954,[3] § 3616 (including § 3616 (a)) was dropped from the code. The only reference to it in the revision is found in Table 1 where § 3616 is shown to be incorporated in new § 7207 of Chapter 75 of the 1954 Revised Code. § 7207 is entirely different from § 3616. It reads:

"§ 7207. Fraudulent Returns, Statements, or Other Documents. Any person who wilfully delivers or discloses to the Secretary or his delegate any list, return, account, state- [fol. 122] ment, or other document, known by him to be

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[3] The date of its approval was August 16, 1954. By § 7851 (a)(6)(C), Chapter 75, relating to crimes, became effective as to offenses committed after the date of enactment of the 1954 Code.

fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both." Internal Revenue Code of 1954, 68A Stat. 853.

§ 7207 appears in the statutory context with other offenses relating to income tax offenses. It is sufficiently broad to apply to both income tax derelictions as well as to those subjects other than income taxes with which § 3616 was in juxtaposition. The only substantive portion of § 3616 which was retained and carried forward in the 1954 revision was placed with income tax derelictions. And then the element of willfulness, absent in § 3616 but previously consistently present in offenses relating to income tax violations, was inserted.

We are convinced, both from the language of § 3616 and the statutory context where it was formerly placed, that it was never intended to apply to income tax violations. If it had been intended to apply to income tax returns, the nonwillful making of an incorrect statement in the making of an income tax return, in the honest belief of its legal justification but which would operate to defeat the assessment of income taxes, would have constituted a crime. In *Spies* v. *United States*, 317 U. S. 492, 497-498, the Supreme Court said that without the clearest manifestation of Congressional intent it would not be assumed that the mere knowing and intentional default in the payment of income tax, where there had been no willful failure to disclose the liability, was intended by Congress to constitute a criminal offense of any degree. The Supreme Court said that the willfulness required to constitute the offense of willful failure to pay income taxes when due, defined by § 145 (a), [fol. 123] would be expected to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer. See also *United States* v. *Kahringer*, 210 F. 2d 565. The same reasoning applies here. We conclude that Congress did not intend by § 3616 (a) that a nonwillful inaccurate and ipso facto false statement in an income tax return, frequently very complicated, should constitute a crime. It only made such a false statement a misdemeanor when, by § 7207, it required that the statement be willfully made and known to be fraudulent or false

as to a material matter. § 3616 (a) not being applicable, there was no error in failing to instruct concerning it.

There was no error in refusing to declare a mistrial because of newspaper publicity. Such matters are within the sound discretion of the trial court and, absent an abuse of discretion, such decisions are not reviewable. The court interrogated the jury after defendant's counsel called attention to the newspaper articles. Only one juror had read either article. He positively said it "did not make sense to him" and would not influence him in the least. There was no abuse of discretion.

The sixth assignment of error is that the court erred in overruling defendant's motion for a directed verdict at the close of all the evidence. The argument is again made that the Government failed to prove an understatement of income in the return filed and no act of fraud. As heretofore stated, the evidence fairly justified a finding by the jury that the money received by defendant was income to him. That evidence, coupled with evidence that defendant attempted to conceal a portion of it by not entering it on his books and not reporting a substantial amount in his returns, was sufficient to show the willful filing of a false [fol. 124] return. Proof of the willful filing of a false return was sufficient to sustain a conviction under § 145 (b) of a willful attempt to defeat or evade income taxes.[4] *Cave* v. *United States*, 159 F. 2d 464; *Myres* v. *United States*, 174 F. 2d 329.

The last assignment is that the court erred in overruling defendant's objection to the revenue agent's testimony in which the agent assumed, for the purpose of calculating the tax due, that the checks heretofore discussed constituted income. The situation here is said to be similar to that in

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[4] We need not and do not consider the effect of the enactment of § 7207 of the 1954 Code with respect to whether proof alone of the willful delivery or disclosure of a false or fraudulent statement or return to the Secretary of the Treasury or his delegate will hereafter, in view of § 7207 making such act a misdemeanor, be sufficient to support a conviction for the felony defined by § 145 (b), now § 7201 et seq. of the 1954 Code.

Kirsch v. *United States*, 174 F. 2d 595. That is not correct, for reasons which have been made clear.

The judgment is affirmed.

[fols. 125-126] In United States Court of Appeals for the Eighth Circuit

No. 15,048

Paul Dillon, Appellant,

vs.

United States of America

Judgment—January 5, 1955

Appeal from the United States District Court for the Eastern District of Missouri

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Paul Dillon, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

January 5th, 1955.

[fols. 127-138] Petition for rehearing covering 9 pages, filed January 25, 1955—omitted from this print.

It was denied, and nothing more by order: February 1, 1955.

[fols. 139-140] IN UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—February 1, 1955

Petition of appellant for a rehearing in this cause has been considered by this Court, and It is now here Ordered that the same be, and it is hereby, denied.

[fols. 141-142] IN UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—February 4, 1955

On Consideration of the motion of the appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

February 4, 1955.

[fols. 143-144] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 145] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 629

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed April 25, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2574-2)

FILED
FEB 23 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. [redacted] 37

PAUL DILLON,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. .....

PAUL DILLON,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on January 5, 1955.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, pp. 17-29.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 5, 1955 (Appendix, infra, p. 30). A timely petition for rehearing was filed by petitioner, and this petition was overruled on February 1, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTIONS PRESENTED.

(1) Whether in a prosecution under a felony indictment for tax evasion under § 145 (b) of the 1939 Internal Revenue Code, the trial court is required by Rule 31 (c) of the Federal Rules of Criminal Procedure to give a requested misdemeanor instruction under § 3616 (a) of the 1939 Internal Revenue Code, and thus allow the jury to determine whether defendant committed the greater or lesser offense.

(2) Whether in a prosecution under a felony indictment for tax evasion under § 145 (b) of the 1939 Internal Revenue Code, the trial court is required by Rule 31 (c) of the Federal Rules of Criminal Procedure to give a requested misdemeanor instruction under § 145 (a) of the 1939 Internal Revenue Code, and thus allow the jury to determine whether defendant committed the greater or lesser offense.

(3) Whether in a prosecution of a lawyer for evading his own income tax based on specific items of income alleged to be unreported, the burden of proof or the burden of going forward with the evidence may be shifted to the taxpayer after merely having a witness identify seven checks payable to and endorsed by the taxpayer, two of which are marked "fees," two marked "legal services," and the rest not marked, when the maker of the checks is available in the courtroom, and in the absence of any evidence concerning the relationship between the maker and the taxpayer, and further in the absence of evidence as to when the markings were placed on the checks.

STATUTES AND RULE INVOLVED.

Rule 31 (c), Federal Rules of Criminal Procedure, provides:

Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

26 U. S. C., former § 145, provides:

(a) **Failure to file returns, submit information, or pay tax.** Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties, provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) **Failure to collect and pay over tax, or attempt to defeat or evade tax.** Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more

than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

26 U. S. C., former § 3616 (a), provides:

Whenever any person—

False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the Court, with costs of prosecution.

STATEMENT.

Petitioner, a 77 year old Missouri lawyer, was convicted by a jury of attempting to defeat and evade the payment of his income tax for the years 1950 and 1951 under a two count felony indictment which charged violations of § 145 (b) of the 1939 Internal Revenue Code, 26 U. S. C. A., § 145 (b), and was sentenced to imprisonment for a period of 15 months and fined $2,500. The indictment accused him of understating taxes in the amounts of $157.00 for the year 1950 and $1,621.14 for the year 1951 (R. 1-2).

The gross receipts shown on petitioner's tax return for 1950 was the total amount listed in his books. The gross receipts shown on petitioner's tax return for 1951 was $999.08 more than the total amount listed in his books (R. 60). The government prosecuted its case on the theory that petitioner's books did not reflect all of his legal fees from two individuals named Broadhead and Packs in 1950 and from Packs alone in 1951 and, consequently, that his income tax returns understated his true income.

All the evidence was presented in about two hours at the trial and consisted principally of the testimony of

Broadhead, an internal revenue agent, and an employee of Packs.

The employee of Thomas Packs (Thomas Packs Amusement Enterprises) identified seven checks of that concern payable to petitioner during the years 1950 and 1951, signed by Packs and endorsed by petitioner (R. 31, 33-39). The employee had no business dealings with petitioner and did not state the reason for the issuance of the checks. He only said that he was identifying certain company records and that he could not testify of his own knowledge that money was paid to petitioner (R. 31-32). Thomas Packs did not testify although he spoke to the revenue agent handling the case in the hall near the court room during the trial (R. 59). Two of the checks (Exhibits Nos. 8, 9) were marked "fees," two of the checks (Exhibits 4, 7) were marked "legal services" and the rest had no markings of purpose (Exhibits 5, 6, 10). There was no testimony as to when these checks were so marked. These seven checks total $10,026.84. Petitioner's book reflected income from Packs in the amount of $3,284.67. The government's theory was that Exhibits 4 and 10 were not entered in petitioner's records, Exhibits 5, 6, 8 and 9 were understated and that Exhibit 7 was correctly entered (R. 52-53). No other evidence was offered concerning either the relationship of petitioner and Packs or the purpose of these checks.

Petitioner represented Broadhead as an attorney in a matter pending in Mississippi from 1949 to 1951 (R. 50). Broadhead paid him $2,000.00 in cash in March, 1950 and $1,250.00 by check in June, 1950 (R. 40). Broadhead testified that petitioner brought in a Mississippi attorney as associate counsel. Broadhead did not pay this associate counsel for representing him (R. 42). However, he knew that the Mississippi attorney was going to be paid, and that it was petitioner's responsibility to pay him. But he did

not know anything about the arrangements between petitioner and associate counsel. Associate counsel, moreover, attended every meeting that Broadhead had with petitioner and appeared in court for him (R. 41-42). Petitioner's books showed $1,000.00 received from Broadhead in March, 1950 and $1,250.00 received from him in June, 1950 (R. 47).

The only evidence of the remainder of petitioner's income, considered to be correctly reported, was petitioner's records (Exhibits Nos. 14, 15 and 16, R. 47-51).

The trial court refused to give either of petitioner's requested instructions that the jury might find him guilty of a lesser offense—specifically, a misdemeanor either under § 3616 (a) or § 145 (a) of the Internal Revenue Code (R. 92-93). Petitioner excepted to the refusal of the Court to give these instructions on the ground that under Rule 31 (c) of the Federal Rules of Criminal Procedure he was entitled to such instructions (R. 94).

The court below (Appendix) affirmed the conviction holding that defendant was not entitled to an instruction as to a lesser offense under Rule 31 (c) of the Federal Rules of Criminal Procedure because § 3616 (a) was inapplicable to income tax violations, and § 145 (a) was inapplicable because it was not an offense presented by the evidence. The court concluded "both from the language of § 3616 and the statutory context where it was formally placed, that it was never intended to apply to income tax returns." The court, in reaching this result, found that § 7207 of the 1954 Internal Revenue Code which replaced § 3616 was broad enough to apply to income tax derelictions and that the "element of willfulness, absent in § 3616 but previously consistently present in offenses relating to income tax violations, was inserted." The court held, in regard to § 145 (a), that there was no evidence offered

"that defendant failed to file a return or to show the willful failure to pay the tax when due, except insofar as willfulness was involved in the charged willful and felonious attempt to evade the payment of taxes owed" and therefore it was not error to instruct on an offense not presented by the evidence.

The court held, in regard to the seven Packs checks, that the foundation offered by the Government fully indicated that the receipts were income and that the transfer of the burden of proof or the burden of going forward with the evidence to the defendant was proper because there was a manifest disparity in convenience of proof and opportunity of knowledge between the defendant and the Government. The court found that the checks payable to defendant were under circumstances indicative that they were for legal services, that this evidence was fairly indicative of income received by defendant and, therefore, all these checks were admissible in evidence. As far as the sufficiency of evidence was concerned, the court stated that the evidence justified a finding that the checks received by defendant represented income and that this evidence, "coupled with evidence that defendant attempted to conceal a portion of it by not entering it on his books and not reporting a substantial amount in his returns, was sufficient to show the willful filing of a false return."

REASONS FOR GRANTING THE WRIT.

1. This case raises important questions concerning Rule 31 (c) of the Federal Rules of Criminal Procedure and its application to income tax derelictions. Whether a defendant charged with a felony under the income tax laws may be convicted of a misdemeanor is a question the settlement of which is plainly in the public interest since it is likely to be presented in current and subsequent income tax

evasion proceedings which number approximately one thousand per year. Moreover, although § 145 (b) has been the principal statute used for prosecuting income tax evasions, the policy of the government of using § 3616 (a) in its stead when the amounts understated have been relatively small has been blocked by the holding below that § 3616 (a) is inapplicable to income tax prosecutions. Furthermore, this decision has an effect on other types of criminal prosecutions since the use of Rule 31 (c) has heretofore been limited mainly to murder or robbery prosecutions.[1]

(a) Section 3616 makes the filing of a false or fraudulent return with intent to defeat or evade the assessment of taxes a misdemeanor. The Court below committed a basic error in refusing to hold that section applicable to income tax derelictions. It reaches this result despite the fact it finds that § 7207 of the 1954 Internal Revenue Code which replaced § 3616 applies to income tax violations. Overlooked are both the Senate and House Committee Reports relative to § 7207 which clearly indicate that the 1954 Code did not change the 1939 Code in this respect. The Senate Report states: "This section, which is identical with the House bill contains no material change in existing law." S. Rep. No. 1622, 83d Cong., 2d Sess. (1954) 603, 1954 U. S. Code Congressional Service 3251. The House Report is identical. H. R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), A 425, 1954 U. S. Code Congressional Service 1111.

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[1] Under a charge of murder, defendant may be convicted of manslaughter. *Stevenson v. United States*, 162 U. S. 313, 315; *Wallace v. United States*, 162 U. S. 466, 476; *Barbeau v. United States*, 193 F. 2d 945. Under an indictment charging robbery, defendant may be convicted of larceny. *Lamore v. United States*, D. C. Cir., 136 F. 2d 766. A suggestion as to its application under the Gamblers' Occupational Tax Act, 26 U. S. C. A., former §§ 3294 (c), 2707 (b), is found in *United States v. Kahringer*, 3 Cir., 210 F. 2d 565, 571-572.

The Court concluded that § 3616 was inapplicable because it did not require a wilful act and that under **Spies v. United States**, 317 U. S. 492, Congress has applied criminal sanctions only to wilful violations of the revenue laws. Ignored is **Morissette v. United States**, 342 U. S. 246, which holds that the mere omission of wilful in a criminal statute does not eliminate intent as an element of the offense. Furthermore, the phrase "with intent to defeat or evade the * * * assessment" in § 3616 indicates wilfulness.

Not only is § 3616 incorporated into § 7207 of the 1954 Code, but § 894 (b) (2) (A) of the 1939 Internal Revenue Code which provided criminal penalties for estate tax derelictions is also incorporated in that new section. Section 894 (b) (2) (A) provided a misdemeanor penalty for the following act:

> "Whoever knowingly makes any false statement in any notice or return required to be filed under this subchapter . . ."

Section 894 (b) (2) (B) is practically equivalent to the wording of § 145 (a), and § 894 (b) (2) (C) is equivalent to § 145 (b). The incorporation of both § 3616 (a) and § 894 (b) (2) (A) into the new section 7207 coupled with the lack of an equivalent in § 145 of § 894 (b) (2) (A) leads to the conclusion that § 3616 (a) was equivalent to § 894 (b) (2) (A). Under this construction "knowingly" in § 894 (b) (2) (A) is equivalent to "with intent to defeat or evade the * * * assessment" in § 3616 (a).

The court below has also overlooked the history of § 3616 as that statute was originally enacted in 1864[2] in an act which imposed an income tax[3] and provided for income tax returns.[4]

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[2] Act of June 30, 1864, c. 173, § 15, 13 Stat. 226.

[3] 13 Stat. 281.

[4] 13 Stat. 225.

The position of § 3616 in the 1939 Code next to §§ 3614 and 3615 which allow the Commissioner of Internal Revenue and the Collector to issue summons for the inspection of records for the determination of tax liability including income tax liability shows that the former statute applies to income tax offenses.

Moreover, the relationship of the fraud penalty imposed by § 3612 (b) (2) with that of § 293 of the Code is of significance. Section 293 specifically provides a fraud penalty for income tax derelictions and states that the penalty so provided shall be "in lieu of the fifty percentum addition for the tax provided in § 3612 (b) (2)." Note that § 145 nowhere states that its penalty shall be in lieu of penalties imposed by § 3616. The fact that Congress in enacting § 293 specifically mentions 3612 is an indication that § 3616 is applicable to income tax derelictions because of their juxtaposition in the same chapter of the Code.

The difference between 145 (b) and 3616 (a) may be that the latter does not require any affirmative act of concealment. The reason for the sparsity of appellate decisions under 3616 (a) may be due to the fact that the same evidence can bring a conviction under 145 (b) if an affirmative act of concealment occurred. **Slick v. United States**, 7 Cir., 1 F. (2d) 897, affirmed a conviction under an income tax indictment which follows the language of § 3616 (a), and therefore apparently applied that section to an income tax violation.

The holding that § 3616 is inapplicable to income tax offenses is, moreover, in apparent conflict with **Taylor v. United States**, 9 Cir., 179 F. 2d 640, a habeas corpus proceeding, which holds that § 3616 did not repeal § 145 (b) by implication. The apparent conflict is recognized by the court below in the instant case when it states:

> "The fact, as pointed out in the Taylor case, . . . that § 3616 was enacted long prior to § 145 and does

provide a penalty for submitting a false return (or list) without willfulness, and none of the later prohibitions of § 145 do so, would be some indication that the existence and application of the older § 3616 to all tax matters, including tax returns, was recognized by Congress when § 145 was enacted, and that the reason for not making provision in § 145 for a penalty for nonwillful filing of a false return was to avoid duplicating § 3616 (a), **if Congress had not indicated such was not the intention when it revised the entire tax code by the Internal Revenue Code of 1954."**

(b) Section 145 (a) makes it an offense (1) to fail to pay a tax,[5] (2) to fail to make a return or declaration for the purpose of the computation, assessment or collection of the tax,[6] (3) to fail to keep any records for such tax purposes, (4) or to fail to supply information for such purposes.[7]

Every violation of Section 145 (b) necessarily includes violations of Section 145 (a) and an offense under the latter section is therefore necessarily included in an offense under the former section. **Spies v. U. S.**, 317 U. S. 492, seems to hold that the felony under Section 145 (b) includes a misdemeanor under Section 145 (a), and that the latter offense is embraced within the former. The issue in the **Spies** case was whether a wilful failure to file a return, together with a wilful failure to pay a tax, may without more constitute an attempt to cheat or evade a tax within the meaning of § 145 (b). This court held that it took more than the sum of two such misdemeanors to make a felony violation under § 145 (b). This court concluded that a felony may include lesser offenses in combination either

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[5] *Spies v. United States*, 317 U. S. 492, 496.

[6] *United States v. Sullivan*, 274 U. S. 259, 262.

[7] *United States v. Murdock*, 290 U. S. 389, 391.

with each other or with other elements, and that the felony proscribed by § 145 (b) include one or several of the other offenses against the revenue laws, and that Congress in using the terminology "attempts . . . to evade or defeat" to cover the gravest of offenses against the revenue law intended "some wilful commission in addition to the wilful omissions that make up the list of misdemeanors."

Every violation of § 145 (b) includes one or more of the omissions proscribed in § 145 (a). One element always required to be present is that a tax be due. A failure to supply information is always present in cases where the evidence shows that a defendant kept a double set of books, made false entries of false invoices, destroyed books or records, concealed assets, concealed the source of his income, or handled his affairs to avoid making the usual records. A misdemeanor and a felony both require a failure to make a disclosure as to the amount of income of the taxpayer. A failure to file returns may constitute a violation of either 145 (a) or 145 (b).[8] To constitute the greater offense, as this Court declared in the **Spies** case, some wilful commission is required (317 U. S. at 499):

> "We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues congress intended some wilful commission in addition to the wilful omissions that make up the list of misdemeanors. Wilful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a wilful and a possible attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony."

The evidence in this case required such an instruction. The Government's theory was that defendant's records

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8 *United States v. Smith*, 3 Cir., 206 F. 2d 905.

did not reflect all of his income. The evidence, therefore, must support the inference that he failed to keep the records required by § 145 (a) which makes it an offense to fail to keep proper records. The Government also contended that defendant did not pay all the tax that he should. Section 145 (a) makes it a misdemeanor to fail to pay a tax when it is due and the payment after the tax was due does not relieve a person from liability under this section. Cf. **Spies v. United States**, supra. One could also infer from the Government's case that the defendant failed to supply information and failed to make a complete return of all his income. If Section 145 (a) in proscribing an offense for failure to make a return also includes the failure to make a complete return, then this too would be embraced by the evidence.[9]

Defendant requested the Court to allow the jury to choose between these misdemeanors and the felony. Where there is evidence to show either a felony or one or more misdemeanors the prosecuting officials should not have the sole choice of deciding the offense of which the accused may be found guilty. If there are several offenses possible under the evidence and if there is a lesser offense embraced within a greater offense, defendant should be entitled, when he so requests, to the verdict of the jury on this issue in accordance with Rule 31 of the Federal Rules of Criminal Procedure.

2. The court below in holding that the evidence was sufficient and that a sufficient foundation was laid for the

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[9] In *Himmelfarb v. United States*, 9 Cir., 175 F. 2d 924, 944, the question of instructing on a lesser offense in a prosecution under § 145 (b) was raised. Appellant there claimed that the court erred in failing to instruct the jury on its own motion that it might find him guilty of a lesser offense embraced within the charge in the indictment; namely, a misdemeanor under § 145 (a). The court held that such an instruction was not justified under such circumstances.

admission of the seven Packs checks has gone beyond the permissible limits set forth in **Holland v. United States,** No. 37, this Term, decided Dec. 6, 1954. The court below has held that even in a specific item case where the Government knows the alleged source of income and where the alleged payer of the income is present in the court room, the Government does not have to call him as a witness.

These seven checks were identified by the secretary of the Thomas Packs Amusement Company, who did not know the reason for their issuance (R. 31-32). Thomas Packs was in the court room and had talked to the revenue agent, but was not called to testify (R. 59). Packs had full knowledge of why the checks were issued. The Government evidently found that Packs would testify to facts indicating that the money received from those checks was not income to defendant and therefore did not use him as a witness. Failure to call a material witness, without good cause showing, justifies the inference that the testimony of the witness would have been unfavorable.[10]

Morrison v. California, 291 U. S. 82, 88, and **United States v. Fleischman,** 339 U. S. 349, 360, were misapplied, as there was no disparity in convenience between the Government and the defense, especially in the absence of any showing by the Government as to the reason why Packs was not called as a witness. Indeed, the failure to call Packs as a witness compels the inference that he would testify that the checks were not income. As for the two checks marked "fees" and the two checks marked "legal services," these markings are hearsay and incompetent, as no foundation was laid for the admissibility of these statements on the checks under the Business Records Statute, 28 U. S. C., § 1732. These exhibits can not lift themselves by their own bootstraps, as a foundation must be established for their introduction by other evidence.

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[10] Schumacher v. United States, 8 Cir., 216 F. 2d 780, 787.

A component of the court's conclusion is that the Government's investigation did not substantiate defendant's statement that the checks were not income. The Government's investigation must check the validity of such a statement. Cf. **Holland v. United States,** supra. Such an investigation should have included an interview with Thomas Packs. Unless Thomas Packs said that the checks were income the revenue agent could not conclude that defendant's statement could not be substantiated. If Thomas Packs told the agent that the checks were income, he should have been called as a witness by the Government. And if, while testifying, he denied that the checks were income, he could be cross-examined as a hostile witness.[11] Failure to call Packs as a witness leads either to the conclusion that Packs never told the revenue agent that the checks were income and, if so, the Government's investigation was insufficient and did not warrant the conclusion that the checks were income, or the conclusion that there was no "disparity in convenience of proof or opportunity of knowledge," as Packs could have been called as a witness. Moreover, there was no evidence showing the "circumstances" under which these checks were given to defendant.

Furthermore, the only evidence that defendant declined to give information relative to the checks was at the pretrial hearing outside the presence of the jury on a motion to suppress evidence (R. 9-10, 11). It would seem that such a foundation, even if sufficient, should have been presented to the jury as well as to the court. And the Government was not without a remedy if the defendant declined to give information as he could have been prosecuted for failing to furnish information. See **United States v. Murdock,** 290 U. S. 389.

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[11] *Finnegan v. United States,* 8 Cir., 204 F. 2d 105, 111; *Banks v. United States,* 8 Cir., 204 F. 2d 666, 671.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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St. Louis 2, Missouri,
Counsel for Petitioner.

APPENDIX.

Opinion.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 15,048.

Paul Dillon, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[January 5, 1955.]

Morris A. Shenker and Sidney M. Glazer for Appellant.

Charles H. Rehm, Assistant United States Attorney (Harry Richards, United States Attorney, and Robert C. Tucker, Assistant United States Attorney, were with him on the brief), for Appellee.

Before Gardner, Chief Judge, and Collet and Van Oosterhout, Circuit Judges.

Collet, Circuit Judge.

The defendant was convicted by a jury of attempting to defeat and evade the payment of income taxes for the years 1950 and 1951. The Government presented evidence showing that defendant's receipts for 1950 were

substantially in excess of the amount reported for that year, and that his receipts for 1951 were approximately $5,700.00 more than reported. The defendant did not testify. Counsel sought to convince the jury that the Government's evidence was consistent with the hypothesis that all of the money shown to have been received by defendant was not income to him. He was an attorney. The argument was made that probably the portion of the receipts which was not reported as income went to associate counsel as fees, or did not belong to defendant, or that at least the Government had not shown the contrary. The court, in its charge to the jury, referring to that argument, instructed the jury that the questions of counsel which may have assumed that possibility were not evidence and that as the court understood the testimony, there was no evidence that the defendant had shared any fees with anyone. That part of the charge is assigned as error here.

As to this first assignment, it is argued that the court's charge was "one-sided" and constituted "advocacy against the defendant." The charge included the usual cautionary admonition that anything contained in it which might be construed by the jury as a comment on the evidence which differed from the jury's understanding of the evidence should be disregarded—that it was the jury's sole province to find the facts. The charge was not argumentative and did not go beyond pointing out the factual situation portrayed by the evidence. The situation here was very different from that in the cases of **Boatright v. United States**, 105 F. 2d 737, and **Billeci v. United States**, 184 F. 2d 394, cited by defendant.

Error is assigned on account of the admission as evidence of seven checks payable and delivered to defendant during the years covered by the indictment. Defendant contends that there was no foundation laid for the introduction of those checks in evidence, because there was no

testimony to the effect that the checks represented taxable income to the defendant. Two of them were marked "legal services", two were marked "fees", and three were not marked. The gravamen of defendant's contention is that before evidence of this nature should be admitted it should be first shown that the money was received under such circumstances as to "strongly" indicate it was actually taxable income, and that the burden of proof or the burden of going forward with the evidence to show that it was not income should not be shifted to the defendant, absent such initial showing. If the word "fairly" be substituted for "strongly", the principle is correct. If the foundation or initial evidence does fairly indicate that the receipts were income, the Government is not required initially to adduce positive evidence to support a negative hypothesis that it was not money received for someone else or that it was not received for some purpose which would prevent it from being income to the person to whom it was paid. The rule is not a new one. The explanation of the reason supporting it and the limitations of its application were stated by Mr. Justice Cardozo in **Morrison v. California**, 291 U. S. 82, 88, and reiterated by Chief Justice Vinson in **United States v. Fleischman**, 339 U. S. 349, 360. For a transfer of the burden—"experience must teach that the evidence held to be inculpatory has at least a sinister significance." 291 U. S. 82, 90. It may be said with considerable force and logic, as defendant now says, "that in view of the nature of the legal profession the mere receipt of money does not represent income," and that the "sinister significance" that it was income does not arise in an income tax prosecution from its receipt alone. But there is another exception so closely related that for practical purposes, at least under circumstances such as these, it is a part and parcel of the exception stated. The latter is—"if this [the sinister significance] be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity of knowledge. * * *

The decisive considerations are too variable, too much distinctions of degree, too dependent in last analysis upon a common sense estimate of fairness or of facilities of proof, to be crowded into a formula. One can do no more than adumbrate them; sharper definition must await the specific case as it arises." 291 U. S. 82, 91.

In the present case the Internal Revenue agent assigned to investigate this case prior to the indictment appears to have made inquiry of defendant seeking to determine if all of the amount of the checks in question did represent income or whether part was received for some other purpose, and that defendant declined to give any information other than that all of it was not income, which latter the agent was unable to substantiate. Under these circumstances the exception to the general rule that the burden of making an explanation will not ordinarily be shifted to the defendant in a criminal case applies, and the problem of the trial court became one of evaluating the circumstances and determining whether in fairness to both parties the evidence should be admitted upon the initial showing and leave to the defendant the opportunity to dispell the inference which could reasonably follow, absent explanation.

Great care should be observed in the exercise of judicial discretion to the end that no shifting of the burden placed upon the prosecution to prove guilt result in requiring to any degree or extent that a defendant prove his innocence. The burden of proof must remain on the prosecution to establish guilt. The administration of justice is not a game of chess or of hide-and-seek. It is a search for truth and the application of the law to the true facts in order that substantial justice be done under the law. The prosecution must not be permitted to introduce evidence which is not so indicative of guilt as to fairly point to guilt and cast the burden on the defendant to disprove an unfair implication or inference. One charged with a crime

may testify in his own behalf or not, as he chooses. In making the choice he must weigh the considerations in favor of a decision not to testify against the possibility or probability that evidence fairly adduced against him will be accepted at its face value with damaging results. If he decides not to explain, when absent an explanation he will appear to be guilty, he shall not be criticized for his choice. But if the evidence is of such a nature that it fairly indicates guilt, a defendant may not be heard to complain that an explanation reposing, comparatively speaking, particularly and peculiarly in him, has not been given by another. We have condemned the use of evidence which in fairness should not under the circumstances have been admitted and the burden cast upon the defendant to explain or suffer the possible consequences. But that is not the situation here. The checks were made payable to the defendant. They were either marked "fees" or "legal services" or were given to him under circumstances indicative that they were for legal services. They were all endorsed by defendant and cashed. The discretion involved in determining that this evidence was fairly indicative of income received by defendant, and permitting its introduction in evidence, was not abused in this instance.

A case involving a factual situation requiring a converse ruling will illustrate the limitation of the exception. In **Kirsch v. United States,** 174 F. 2d 595, the defendant was charged with having received income in an amount equal to his bank deposits. The Government's witness was permitted to assume that all of the bank deposits represented income, when the Government's investigation had disclosed that a large part of those deposits represented pay checks cashed for customers out of funds theretofore drawn from the bank for that purpose. Under those circumstances it was held unfair to admit the evidence of total deposits, characterized as income, and permit the inference from the proof of the amount of the deposits that all of those de-

posits constituted income, thereby casting the burden on defendant to disprove that inference.

It is asserted that the court committed reversible error in permitting the revenue agent to testify that Exhibits 4 and 10, two of the checks heretofore referred to, were not recorded in defendant's records and that Exhibits 5, 6, 8, and 9, four of those checks, were understated in those records. The complaint that is made is that the witness was testifying as an expert, that expert testimony is only admissible when the facts are so complicated that expert testimony is needed to assist the jury, that the defendant's records and the facts to be gleaned therefrom were not complicated and the jury did not need expert guidance. The argument is ingenious but lacks substance and merit. The records were in evidence before the jury. They were not voluminous. The cash receipt book, which the witness was familiar with, was handed to him and he was asked whether Exhibits 4 and 10 were recorded therein. Over defendant's objection that the question called for "a conclusion and opinion and comparison of documents," and that it had not been shown that the checks represented income, the witness answered that Exhibits 4 and 10 were not recorded. When asked about Exhibits 5, 6, 8, and 9, he testified that Exhibits 5 and 6, which were in evidence, totaled $4,500.00 and were recorded in the record as $1,500.00; that Exhibits 8 and 9, also in evidence, totaled $3,500.00 and were entered in the books as $1,500.00. These records were not very legible or orderly. The witness had made a calculation of the total receipts of the defendant. If the records were so abstruse as not to be readily understandable by the jury, an explanation was appropriate. But if it be assumed that the records were not of such a nature as to justify expert testimony to decipher or simplify them, then the checks and the records clearly showed for themselves what they alluded to and there was no possible prejudice in the witness so stating.

And if, as defendant contends, the latter be the situation, the witness' testimony was admissible for the purpose of explaining how his total figure of defendant's income was arrived at from these books. There was no prejudicial error in permitting this testimony.

Defendant was charged with a felony under § 145 (b), 26 U. S. C. A. § 145 (b). He requested an instruction that the jury might find him guilty of a lesser offense—specifically, a misdemeanor under § 145 (a), 26 U. S. C. A. § 145 (a), or § 3616 (a), 26 U. S. C. A. § 3616 (a). The request was denied. He contends that the lesser offenses defined in § 145 (a) and § 3616 (a) are included in the greater defined by § 145 (b) and that under Rule 31 (c) of the Federal Rules of Criminal Procedure,[1] he was entitled to the instruction. The pertinent portions of § 145 (a), § 145 (b), and § 3616 (a) are quoted in the footnote.[2]

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[1] "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

Fed. Rules Cr. Proc., rule 31 (c), 18 U. S. C. A.

[2] § 145 (a). "Failure to file returns, submit information, or pay tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, * * * be guilty of a dismemeanor * * *."

(b) "Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, * * * be guilty of a felony * * *."

26 U. S. C. A. § 145 (a) and (b).

§ 3616. Penalties.

"Whenever any person—

(a) False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with in-

As stated in **Spies v. United States**, 317 U. S. 492, 493, "Section 145 (a) makes, among other things, willful failure to pay a tax **or** make a return * * * a misdemeanor. Section 145 (b) makes a willful attempt in any manner to evade or defeat any tax * * * a felony." The indictment did not charge, nor did the evidence show, that defendant merely failed to pay a tax or failed to make a return. On the contrary, the evidence showed that a return was filed and a tax was paid. No evidence was offered that defendant failed to file a return or to show the willful failure to pay the tax when due, except insofar as willfulness was involved in the charged willful and felonious attempt to evade the payment of taxes owed. Hence the universal rule that it is not error to fail to instruct on an offense not presented by the evidence applies. There consequently was no error in failing to instruct that defendant might have been convicted of either of the misdemeanors defined by § 145 (a), of willful failure to pay a tax when due or willful failure to file a return.

As the quoted portion of § 3616 (a) shows, that section makes a misdemeanor the filing of a false or fraudulent list or return with intent to defeat or evade the assessment of taxes. Was this misdemeanor included in the felony defined by § 145 (b)? Defendant cites **Kirsch v. United States**, 174 F. 2d 595, as authority that it was.

The question of whether evidence which the defendant **claimed** only showed a violation of § 145 (a), coupled with evidence of a violation of § 3616 (a) of filing a false or fraudulent list or return, would sustain a conviction of feloniously attempting to evade or defeat the payment of a tax under § 145 (b), was presented in **Kirsch v. United**

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tent to defeat or evade the valuation, enumeration, or assessment intended to be made * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

26 U. S. C. A. § 3616 (a).

States. Upon the record in that case the question was found to be abstract because, as was stated in the opinion, "**If** there was need for proof of affirmative acts other than those defined as misdemeanors in Sections 3616 (a) and 145 (a) in furtherance of an attempt to evade taxes, it is contained in the record." The present question not being presented by the record in the **Kirsch** case, it was not decided. Now we are confronted with the problem of determining whether § 3616 (a) really applies to income tax returns. If it does not apply to income tax violations, the offense it defines was not included in the felony charge based on § 145 (b) and Rule 31 (c) did not authorize a conviction under the felony charge of the lesser offense defined by § 3616 (a). And, if that be true, an instruction authorizing a conviction for the misdemeanor, not embraced in the felony charge, was not appropriate. The question has not been passed upon directly. We take note of cases cited by defendant.

In **Cave v. United States,** 159 F. 2d 464, this court sustained a conviction under § 145 (b) upon proof that the defendant willfully filed a false and fraudulent return. No exceptions were taken to the instructions at the time of trial. On appeal, complaint was made of the instructions on the ground that they were so indefinite, inconsistent and prejudicial as to require reversal, although no exceptions were taken. The precise point now presented, that the defendant was entitled to an instruction on the misdemeanor defined in § 3616 (a) in the event the jury found a false return had been filed but failed to find that it was willfully false, was not raised. In **Myres v. United States,** 174 F. 2d 329, the situation was the same.

In **Taylor v. United States,** 179 F. 2d 640, on an appeal from a denial of habeas corpus, one convicted under § 145 (b) contended that § 145 (b) had been repealed by implication by § 3616 (a). In that case note was not taken

of the fact that § 145 (b) involves willfulness while § 3616 does not. The court rested its denial of the contention on the fact that § 3616 (a) was originally enacted long prior to the enactment of § 145 (b) and could not have repealed by implication § 145 (b). Our attention has not been directed to any other reported cases in which there was any contention that § 3616 (a) applied to income tax violations.

The language of § 3616 (a), which appears under the heading "Penalties," differs from that customarily applied to income tax returns. Its juxtaposition to statutes relating to the duty of collectors to canvass their districts for taxable persons and objects, 26 U. S. C. A., § 3600; the entry of premises for examination of taxable objects during the day or night (§ 3601); search warrants (§ 3602); the making of a "list or return" by taxpayer of articles, objects, goods, wares and merchandise made or sold, charged with a tax, the rates of the tax and aggregate amount thereof, and if such list is not made by the taxpayer, the list should be made by the collector (§ 3611); the provision for penalties for failure to file "returns or lists" (§ 3612) without reference to similar penalties found in connection with that part of the code relating specifically to income taxes; rewards to informers with respect to illegally produced petroleum (§ 3617); all would appear to indicate a relationship of § 3616 to subjects other than income taxes. The fact, as pointed out in the **Taylor** case, 179 F. 2d 640, that § 3616 was enacted long prior to § 145 and does provide a penalty for submitting a false return (or list) without willfulness, and none of the later prohibitions of § 145 do so, would be some indication that the existence and application of the older § 3616 to all tax matters, including income tax returns, was recognized by Congress when § 145 was enacted, and that the reason for not making provision in § 145 for a penalty for nonwillful filing of a false return was to avoid duplicating § 3616 (a),

if Congress had not indicated such was not the intention when it revised the entire tax code by the Internal Revenue Code of 1954.

When the Internal Revenue Code was revised in 1954,[3] § 3616 (including § 3616 (a)) was dropped from the code. The only reference to it in the revision is found in Table 1 where § 3616 is shown to be incorporated in new § 7207 of Chapter 75 of the 1954 Revised Code. § 7207 is entirely different from § 3616. It reads:

"§ 7207. Fraudulent Returns, Statements, or Other Documents. Any person who wilfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both." Internal Revenue Code of 1954, 68A Stat. 853.

§ 7207 appears in the statutory context with other offenses relating to income tax offenses. It is sufficiently broad to apply to both income tax derelictions as well as to those subjects other than income taxes with which § 3616 was in juxtaposition. The only substantive portion of § 3616 which was retained and carried forward in the 1954 revision was placed with income tax derelictions. And then the element of willfulness, absent in § 3616 but previously consistently present in offenses relating to income tax violations, was inserted.

We are convinced, both from the language of § 3616 and the statutory context where it was formerly placed, that it was never intended to apply to income tax violations. If it had been intended to apply to income tax returns, the nonwillful making of an incorrect statement in the making of an income tax return, in the honest belief of its legal

[3] The date of its approval was August 16, 1954. By § 7851 (a) (6) (C), Chapter 75, relating to crimes, became effective as to offenses committed after the date of enactment of the 1954 Code.

justification but which would operate to defeat the assessment of income taxes, would have constituted a crime. In **Spies v. United States**, 317 U. S. 492, 497-498, the Supreme Court said that without the clearest manifestation of Congressional intent it would not be assumed that the mere knowing and intentional default in the payment of income tax, where there had been no willful failure to disclose the liability, was intended by Congress to constitute a criminal offense of any degree. The Supreme Court said that the willfulness required to constitute the offense of willful failure to pay income taxes when due, defined by § 145 (a), would be expected to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer. See also **United States v. Kahringer**, 210 F. 2d 565. The same reasoning applies here. We conclude that Congress did not intend by § 3616 (a) that a nonwillful inaccurate and ipso facto false statement in an income tax return, frequently very complicated, should constitute a crime. It only made such a false statement a misdemeanor when, by § 7207, it required that the statement be willfully made and known to be fraudulent or false as to a material matter. § 3616 (a) not being applicable, there was no error in failing to instruct concerning it.

There was no error in refusing to declare a mistrial because of newspaper publicity. Such matters are within the sound discretion of the trial court and, absent an abuse of discretion, such decisions are not reviewable. The court interrogated the jury after defendant's counsel called attention to the newspaper articles. Only one juror had read either article. He positively said it "did not make sense to him" and would not influence him in the least. There was no abuse of discretion.

The sixth assignment of error is that the court erred in overruling defendant's motion for a directed verdict at the

close of all the evidence. The argument is again made that the Government failed to prove an understatement of income in the return filed and no act of fraud. As heretofore stated, the evidence fairly justified a finding by the jury that the money received by defendant was income to him. That evidence, coupled with evidence that defendant attempted to conceal a portion of it by not entering it on his books and not reporting a substantial amount in his returns, was sufficient to show the willful filing of a false return. Proof of the willful filing of a false return was sufficient to sustain a conviction under § 145 (b) of a willful attempt to defeat or evade income taxes.[4] **Cave v. United States,** 159 F. 2d 464; **Myres v. United States,** 174 F. 2d 329.

The last assignment is that the court erred in overruling defendant's objection to the revenue agent's testimony in which the agent assumed, for the purpose of calculating the tax due, that the checks heretofore discussed constituted income. The situation here is said to be similar to that in **Kirsch v. United States,** 174 F. 2d 595. That is not correct, for reasons which have been made clear.

The judgment is affirmed.

A true copy.

Attest:

E. E. Koch,
Clerk, U. S. Court of Appeals,
Eighth Circuit.

(Seal)

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[4] We need not and do not consider the effect of the enactment of § 7207 of the 1954 Code with respect to whether proof alone of the willful delivery or disclosure of a false or fraudulent statement or return to the Secretary of the Treasury or his delegate will hereafter, in view of § 7207 making such act a misdemeanor, be sufficient to support a conviction for the felony defined by § 145 (b), now § 7201 et seq. of the 1954 Code.

Judgment.

UNITED STATES COURT OF APPEALS
for the
Eighth Circuit.

No. 15048 . . . September Term, 1954.

Wednesday, January 5, 1955.

Paul Dillon,

Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Paul Dillon, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

January 5th, 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 629

PAUL DILLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 17-29) is reported at 218 F. 2d 97.

JURISDICTION

The judgment of the Court of Appeals (Pet. 30) was entered on January 5, 1955, and a petition for rehearing was denied on February 1, 1955. The petition for a writ of certiorari was filed on February 28, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court should have instructed the jury that petitioner, who had been indicted for the felony of attempted evasion of income taxes, could be convicted of the misdemeanor of filing a false return with intent to defeat the assessment.

2. Whether the trial court should also have instructed the jury that petitioner could be convicted of a misdemeanor for failure to pay a required tax, file a return, or supply information.

3. Whether the evidence was sufficient to justify the verdict.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

(a) [as amended by Sec. 5(c), Current Tax Payment Act, c. 120, 57 Stat. 126] *Failure to File Returns, Submit Information, or Pay Tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition

to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False Returns.*—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * *

* * * * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(26 U.S.C. 1952 ed., Sec. 3616.)

Federal Rules of Criminal Procedure:

RULE 31. Verdict

* * * * *

(c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

STATEMENT

On November 13, 1953, petitioner was indicted in the United States District Court for the Eastern District of Missouri on charges of wilfully attempting to evade his income taxes for the years 1950 and 1951 by filing fraudulent returns, in violation of Section 145(b) of the Internal Revenue Code of 1939. (R. 1-2.) The amounts of income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		*Corrected*	
	Income	*Tax*	*Income*	*Tax*
Count I (1950)	$1,526.11	$ 32.00	$ 2,526.11	$ 189.00
Count II (1951)	8,022.91	1,642.87	12,656.43	3,264.01

After a jury trial petitioner was found guilty as charged (R. 97-98), and on March 22, 1954, he was

fined $2,500 on the first count and sentenced to imprisonment for fifteen months on each count, the terms to run concurrently (R. 100-101).

The evidence to support the verdict may be summarized as follows:

Petitioner, who is an attorney, recorded the fees he received during 1950 and 1951 in a notebook. (R. 47-51, 58.) For 1950 the total receipts reported in petitioner's return coincided exactly with the sum of the fees recorded in the book. (R. 19, 47.) The 1951 return reported total receipts about $750 in excess of the fees entered in the book. (R. 27, 49-51.)

There was evidence that during 1950 petitioner received $2,000 in additional legal fees which he neither recorded nor reported. The notebook recorded the receipt of $1,000 from one Broadhead in March 1950. (R. 47.) But Broadhead testified that he paid petitioner $2,000 for legal services about March 20, 1950, and that the payment was made, at petitioner's request, in cash. (R. 40-41.) The notebook recorded no receipts during 1950 from Thomas N. Packs. (R. 47.) But the Government introduced a cancelled check in the amount of $1,000 from Packs to petitioner dated March 24, 1950. (R. 31, 33.) Upon the face of the check appears the following caption, "By indorsement this check is accepted in full payment of the following account," beneath which is written the notation, "Legal Services." Both Packs' signature and the indorsement by petitioner were identified

(R. 31, 46), and there was testimony that the checks had been cashed (R. 32).

There was also evidence that during 1951 petitioner received additional fees amounting to about $5,000 which he neither recorded nor reported. The notebook recorded receipts from Packs of $1,500 in January, $284.67 in April, and $1,500 in November. (R. 49-51.) But the Government introduced six cancelled checks from Packs to petitioner for the following amounts: $4,500 in January, $284.67 in April, $3,500 in November, and $742.17 in December. (R. 31, 33-40.) Three of these bear the notation "Fees" or "Legal Services" beneath the caption mentioned in the previous paragraph. Packs' signature and petitioner's indorsement were identified (R. 31, 46), and again there was evidence that the checks had been cashed (R. 32).

The revenue agent who conducted the investigation testified that when he asked for an explanation of the unreported items petitioner stated that they did not constitute income to him. However, he presented no substantiation of this claim to the agent, and although the agent asked to see his cancelled checks for 1950 and 1951 petitioner did not produce them all.[1] (R. 58-59.) Petitioner did not take the stand at the trial and offered no evidence in his own behalf. (R. 61.)

Petitioner requested that the jury be instructed that it might find him guilty of a lesser crime than

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[1] Petitioner's refusal to substantiate his explanation of the unreported items was developed at greater length during a pretrial hearing on his motion to suppress evidence. (R. 8-14.)

that charged in the indictment. Under one of the proposed charges the jury would have been instructed to find him guilty of a violation of Section 145(a) of the Internal Revenue Code of 1939 if it believed that he had wilfully failed to pay taxes, make returns, keep records, or supply information required by law. (R. 92-93.) Under the other proposed charge the jury would have been instructed to find him guilty of a violation of Section 3616(a) of the Internal Revenue Code of 1939 if it believed that he had delivered a false income tax return to the Collector with intent to evade the assessment of the tax. (R. 93-94.) The trial court refused both requests. (R. 92.)

The Court of Appeals unanimously affirmed the conviction. (Pet. 17-30.)

ARGUMENT

1. The second requested instruction refused by the trial court would have permitted the jury to convict petitioner of a misdemeanor under Section 3616(a) of the Internal Revenue Code of 1939, *supra,* pp. 3-4, if it found that he filed a false return with intent to defeat or evade the assesment. The theory of the request was that a violation of Section 3616(a) was necessarily included in the violation of Section 145(b) (*supra,* p. 3) alleged in the indictment. The Court of Appeals, concluding that Section 3616(a) does not apply to income taxes, held that the instruction was properly refused. (Pet. 24-28.) Petitioner contends (Pet. 8-11) that Section 3616(a) *does* apply to income

tax returns, and that the decision below was therefore, erroneous. We agree with the premise, but the conclusion does not follow. Although we believe the reasoning of the Court of Appeals to be incorrect, the ultimate disposition of the appeal was proper, for, in the circumstances of this case, both sections of the Internal Revenue Code punish the same act and there is no question of a "necessarily included" lesser offense.

As petitioner points out (Pet. 8), Section 3616 (a) has frequently been utilized by the Government in the prosecution of income tax cases in which the evidence of wilful evasion, though technically adequate to warrant the institution of proceedings under Section 145(b), discloses an offense of such minor importance as to justify the choice of a misdemeanor charge instead of one sounding in felony. There are, for instance, numerous cases in which small taxpayers evade very small portions of their income taxes by claiming false dependents in their returns. A reluctance to bring felony charges in these cases is easily understood, and the Department of Justice has for some time normally proceeded against such taxpayers under Section 3616(a). We agree with petitioner that this section of the Code has application. We think the language, "with intent to defeat or evade," clearly indicates the necessity for proof of wilfulness; and the enactment of the predecessor of Section 3616(a) in 1864 as part of a Revenue Act which included an income tax,[2] its

[2] Act of June 30, 1864, c. 173, 13 Stat. 223, 225, 226, 281-285.

collocation in the Internal Revenue Code of 1939, and its incorporation in Section 7207 of the Revenue Act of 1954, all point to its applicability to false income tax returns. This position has been tacitly assumed in a number of cases.[3] *Ex parte Cohen,* 191 F. 2d 300 (C.A. 9th), certiorari denied, 342 U.S. 947; *Taylor* v. *United States,* 179 F. 2d 640, 643-644 (C.A. 9th); *Kirsch* v. *United States,* 174 F. 2d 595, 597-598 (C. A. 8th); *Ex parte Berkoff,* 65 F. Supp. 976, 979-981 (D. Minn.); *United States* v. *Koppelman,* 61 F. Supp. 1007, 1008-1009 (M.D. Pa.); see also 10 Mertens, *Law of Federal Income Taxation,* Sec. 55.66.

However, the misdemeanor of filing a false return with intent to defeat the assessment is not a lesser offense "necessarily included" (Rule 31(c), Federal Rules of Criminal Procedure, *supra,* p. 4) within the felony of attempted evasion of income taxes. The theory of the necessarily included offense postulates a gradation in which the greater offense contains some aggravating incident not found in the lesser. 1 Wharton, *Criminal Law* (12th ed., 1932), Sec. 33; and see the cases cited in the petition, page 8, footnote 1. No such aggravating incident is to be found among the elements of Section 145(b) upon comparison

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[3] Although the holding of the court below will to some extent impede the Government's policy of proceeding against minor offenders under the provisions of Section 3616(a), the issue is one of steadily diminishing importance since Section 3616(a) has been replaced by Section 7207 of the Internal Revenue Code of 1954 which, as the Court of Appeals agreed (Pet. 27), clearly has application to income tax returns.

with the elements of Section 3616(a). Petitioner's hesitant suggestion (Pet. 10) that Section 145(b) may require some affirmative act of concealment not required by Section 3616(a) is obviously unsound in view of the express provision of the latter statute prohibiting the affirmative act of delivery or disclosure of a false return. What we have here are two statutes, each of which punishes exactly the same act. Each prohibits a wilful attempt to evade and defeat income taxes. It is true that Section 145(b) is broader in scope, in the sense that it punishes *any* attempt to evade, and a conviction may be obtained under Section 145(b) even though the taxpayer has not filed a false return. *Spies* v. *United States,* 317 U.S. 492, 500; *United States* v. *Smith,* 206 F. 2d 905, 908-910 (C.A. 3d); *United States* v. *Kafes,* 214 F. 2d 887 (C.A. 3d), certiorari denied, 348 U.S. 887. But whenever a taxpayer does file a false return with intent to defeat the tax, the evidence will justify a conviction under either statute. This is only one of many possible ways of attempting to evade taxes.

The concept of the "necessarily included offense" has been defined as follows: "To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." *House* v. *State,* 186 Ind. 593, 117 N.E. 647, quoted with approval in *Giles* v. *United States,* 144 F. 2d 860, 861 (C.A.9th). The concept has no application in this case. As we have noted, the

felony under Section 145(b) may be committed without perpetrating the misdemeanor under Section 3616(a). On the other hand, one cannot commit the misdemeanor of delivery of a false income tax return with intent to evade the assessment without at the same time committing the felony of attempted income tax evasion.

Petitioner cannot complain because the charge against him was brought under the statute carrying the more serious penalty. As this Court noted in *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46, "Congress recognized that some methods of attempting to evade taxes would violate other statutes as well." And "the Courts of Appeals have uniformly applied §145(b) to attempts to evade taxes by filing false returns." *Ibid.* No lesser included offense was involved here, and the second requested instruction was properly refused.

2. Petitioner contends (Pet. 11-13) that he was entitled to have the trial court instruct the jury that he could be found guilty of the misdemeanor of failing to pay a required tax, file a return, or supply information. He argues in support of this claim that every violation of Section 145(b) necessarily includes violations of Section 145(a), *supra*, pp. 2-3. The contention is without merit.

It is obvious that the two sections define different offenses, and that not every wilful attempt to evade income taxes (a felony) necessarily involves a default in payment, or an omission to make a return or supply required information (a

misdemeanor). As this Court pointed out in *Spies* v. *United States*, 317 U.S. 492, 499, the felony involves "some willful commission" in contrast with the "willful omissions that make up the list of misdemeanors." The Court of Appeals for the Third Circuit recently adverted to the separate nature of the two offenses in a case in which the taxpayer had been convicted of violation of *both* Section 145(a) and Section 145(b) *for the same year*. *United States* v. *Kafes*, 214 F. 2d 887 (C.A. 3d), certiorari denied, 348 U.S. 887. That Court said (pp. 890-891):

> Sections 145(a) and (b) define separate offenses. Since *Spies* v. *United States*, 1943, 317 U.S. 492, 63 S. Ct. 364, 87 L. Ed. 418, it has been clear that a showing of a failure to file plus other affirmative acts is sufficient to sustain a conviction under section 145(b), but that a willful failure to file alone is not sufficient. See *United States* v. *Smith*, 3 Cir., 1953, 206 F. 2d 905. In the present case, the trial court correctly charged that there was evidence of acts of commission which could supply the needed quantum: for example, defendant's avoidance of making proper books of account and records; his failure to enter some items in the duplicate receipt books that he did finally begin to keep; and the cashing of checks without clearance through his bank account. See *Spies* v. *United States*, *supra*, 317 U.S. at page 499, 63 S. Ct. at page 368.

Nevertheless, the question remains whether, since the section 145(a) violation was used to prove in part the section 145(b) violation, defendant could be convicted for the misdemeanor. The governing rule has been reiterated recently by the Supreme Court in *Pereira* v. *United States,* 1954, 347 U.S. 1, 9, 74 S. Ct. 358, 363: "* * * [D]efendant may be convicted of [two separate offenses] even though the charges arise from a single act or series of acts, so long as each requires the proof of a fact not essential to the other." It is not necessary to prove a failure to file to convict for an attempt to evade; for example, section 145(b) may be violated by the filing of a false return. See *United States* v. *Croessant,* 3 Cir., 1949, 178 F. 2d 96, certiorari denied, 1950, 339 U.S. 927, 70 S. Ct. 626, 94 L. Ed. 1348. Conversely, it is not necessary to show the acts of commission required by the *Spies* case to prove a willful failure to file a return. For further differences, see *O'Brien* v. *United States,* 7 Cir., 51 F. 2d 193, certiorari denied, 1931, 284 U.S. 673, 52 S. Ct. 129, 76 L. Ed. 569. Defendant argues that, even though failure to file a return need not be shown to prove an attempt to evade, the double jeopardy provision is applicable when that failure is in fact used. The short answer to this contention is that the rule itself, as quoted above, sanctions the use of one act as part of the proof of both offenses.

On the present record the separate nature of the two offenses is much more obvious than it was in *Kafes*, for here, as the court below noted (Pet. 24), there was no evidence that petitioner had simply omitted to file a return, pay the tax due, or supply information. What this record shows is a "willful commission"—the filing of a fraudulent return containing false information and the payment of a part of the tax with the representation that no more was due. Consequently, it was not error to refuse petitioner's first request, since no instruction should be given on a lesser included offense where there is no evidence to justify it. *Davis* v. *United States*, 165 U.S. 373, 378-379; *Sparf and Hansen* v. *United States*, 156 U. S. 51, 63; *Burcham* v. *United States*, 163 F. 2d 761, 762 (C. A. D. C.).

3. There is no merit in petitioner's final contention (Pet. 13-15), that the evidence was insufficient to support the verdict. When the seven Packs checks were introduced, both the signature of Packs and petitioner's indorsement were properly identified and there was additional testimony that they had been cashed. (R. 31, 32, 46.) Petitioner's notebook recorded a portion of these sums as the receipt of legal fees from Packs, thus establishing the attorney-client relationship between them. (R. 49-51.) Moreover, some of the checks specifically purported to be payment for legal services. (R. 33-37.) Petitioner's indorsement of the checks constituted an admission of this fact, and, though afforded the opportunity by the agents

during the investigation, he failed to produce any substantiation for his claim that the unrecorded and unreported amounts did not constitute income to him. (R. 58-59.) Since the receipt of unreported income was clearly indicated by competent evidence, the Government was not bound to show more.[4] See *Holland* v. *United States*, 348 U. S. 121, 138; *Rossi* v. *United States*, 289 U. S. 89, 91-92.

Petitioner contends that this evidence was insufficient in view of the fact that the Government failed to avail itself of the direct testimony of Packs, despite the fact that he was present in the courtroom. There is speculation (Pet. 14) that the Government must have found that Packs would have testified that the amounts in question were not income to petitioner. But Packs was equally available to petitioner, and the much more probable explanation is that Packs had told conflicting stories during the investigation with the result that neither side was willing to vouch for his veracity as a witness. The Government is not, of course, required to put a hostile witness on the stand. The failure to produce Packs afforded grounds for argument to the jury, but it did not detract from the substantiality of the Government's prima facie case.

---

[4] Petitioner does not challenge the sufficiency of the evidence as to the unreported $1,000 received from Broadhead in 1950. This is sufficient to support the conviction in itself, since the total sentence imposed is within the maximum allowable under any one count. *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642.

CONCLUSION

The judgment of the Court of Appeals is correct, and the petition presents no issue requiring further review. The petition for certiorari should be denied.

Respectfully submitted,

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MARCH, 1955.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 629.

PAUL DILLON,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

ARGUMENT.

The Government's interpretation is that Section 3616 (a) and Section 145 (b) are "two statutes each of which punishes exactly the same act. Each prohibits a wilful attempt to evade and defeat income taxes." The Government further says: "that whenever a taxpayer does file a false return with intent to defeat the tax, the evidence will justify a conviction under either statute." Since the

instant indictment, in each count, merely charges an attempt to evade and defeat income taxes by the sole means of filing a false and fraudulent return, a violation of both statutes is charged, as under the Government's position, such facts constitute both a misdemeanor in violation of § 3616 (a) and such facts, without more, constitute a felony in violation of § 145 (b). In **Williams v. United States**, 168 U. S. 382, 389, it is said:

> "It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment if the charges made are embraced by some statute in force. The indorsement on the margin of the indictment constitutes no part of the indictment and does not add to or weaken the legal force of the averments. We must look to the indictment itself, and if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute."

The only way that it can be said that a defendant under such circumstances knows the nature of the accusation is to say that he is charged under both statutes. The Government's argument that defendant is not entitled to a lesser offense instruction because the words "necessarily included" in Rule 31 (c) only mean that the lesser offense must be necessarily included in the statutory definition of the greater offense leads to the conclusion that under an indictment, such as the instant one, which can be construed as charging either a misdemeanor or a felony, defendant can only be convicted of a felony.

The Government overlooks the fact that in jurisdictions where "necessarily included" is construed in this manner, there is an exception. Where an indictment charges not only the major offense, but also in terms charges a lesser

offense, accused may be convicted of the lesser offense even though it does not form a constituent part of the major offense charged. In **Stapleton v. Commonwealth**, 140 Va. 475, 124 S. E. 237, 240-241, it is said:

> "The case does not fall within the control or influence of such cases as the Hardy and Curry Case, 17 Grat. (58 Va.) 592, strongly relied on for the accused, in which the indictment in terms charges only one major offense, which is held to also embrace the charge of all lesser offenses which are incident to and constitute elements of the major offense. In such cases, only such lesser offense as are in their nature constitutent parts of the major offense can be considered as charged in the indictment, and conviction of such character of lesser offense only can be had and enforced under such an indictment. But such an indictment as that in the instant case is not one which in terms charges only one major offense. It in terms charges both the major and the lesser offense in question, and the conviction of the lesser offense charged may be had and enforced under such an indictment, because, as aforesaid, the indictment contains a competent specific charge of the lesser offense at common law, and not because the lesser offense is of such character that it is an element of the major offense charged."

The rule is established that a defendant may only be convicted of two separate offenses arising from a single act if each requires proof of a fact not essential to the other. **Pereira v. United States**, 1954, 347 U. S. 1. Here, however, under the Government's interpretation, a violation of both statutes does not require proof of any facts not essential to the other. Significantly, the Government does not say that a defendant could be convicted under both statutes as it does in its argument concerning 145 (a).

The Government says that it utilizes § 3616 instead of § 145 (b) where "small taxpayers evade small portions of their income taxes . . ." The amounts alleged to be underestimated in the instant case are relatively small, $157.00 for 1950 and $1,621.14 for 1951. The prosecuting officials should not be given the sole discretion to determine what statute was violated but that question should be left to the jury. Therefore when an indictment may be construed to charge a felony or misdemeanor, a more reasonable construction of Rule 31 (c) is that the lesser offense is "necessarily included in the offense charged" since there is as much cause to give a lesser offense instruction as when the lesser offense differs from the greater merely because it lacks an element contained in the latter.

Rule 31 (c) says that a defendant may be found guilty of "an offense necessarily included in the offense charged." A similar provision has been construed to mean that the lesser offense must be included in the acts set forth in the indictment as constituting the crime for which defendant is charged rather than a construction requiring the lesser offense to be included in the statutory definition of the crime for which defendant is indicted. **People v. Miller**, 143 App. Div. 251, 128 N. Y. S. 549, 550, affd., 202 N. Y. 618, 96 N. E. 1125; **People ex rel. Poulous v. McDonnell**, 302 N. Y. 89, 96 N. E. 2d 614. There are two good reasons for such interpretation. The first is stated in the **Poulous** case as follows (302 N. Y. at 91, 96 N. E. 2d at 615):

> "It is the statutory as well as a common law rule that a prosecution ought not to fail for lack of proof that the crime charged is shown to have been committed in a lesser degree than charged in the indictment; in such case the jury may find the defendant guilty of the lesser degree."

The other reason is that the prosecuting officials should not have absolute discretion to decide the offense of which the accused may be found guilty.

Even if the lesser offense must be necessarily included in the statutory definition of the crime for which defendant is indicted, defendant was still entitled to instructions as to the lesser offenses. The phrase, "in any manner," as used in Section 145 (b) is not employed in a vacuum but has to be considered in relationship to the entire tax structure and the possible methods of tax evasions. Section 3616 forbids not only the delivery of "any false or fraudulent list, return account or statement" but also proscribes against the disclosure of such items. Since every reported tax evasion case either contains a false statement or false disclosure to a Government representative, Section 3616 is as broad in fact as Section 145 (b). **United States v. Kafes**, 3 Cir., 214 F. 2d 887, and **United States v. Smith**, 3 Cir., 206 F. 2d 905, are the two reported cases affirming convictions for tax evasions where no tax returns were filed. Defendant in the **Kafes** case did not keep proper books of account and therefore one can infer that he disclosed a false account to a Government representative in violation of Section 3616. And in **Smith**, defendant made false representations to revenue agents and altered his records which undoubtedly led to a false disclosure. The illustrative methods of tax evasion set forth in **Spies v. United States**, 317 U. S. 492, 499, would all constitute violations of Section 3616.

Assuming further that Section 3616 is not as broad as Section 145 (b), a lesser instruction still should have been given. Section 3616 and Section 145 (a) should be considered as if they were one statute. Considering these statutes as one, it is clear that there can be no violation of Section 145 (b) without violating these combined misdemeanor provisions. Embraced in every violation of the

major offense is a lesser dereliction. Whether a lesser offense instruction is required should not rest on the narrow ground that these two misdemeanor sections are in two different statutes as the same Congressional intent is involved whether they are embodied in the same or different statutes.

CONCLUSION.

For the reasons set out above and those set out in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 37.

PAUL DILLON,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the Court of Appeals (R. 111-122) is reported at 218 F. 2d 97.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 5, 1955 (R. 122), and a petition for rehearing was denied on February 1, 1955 (R. 122). The petition for a writ of certiorari was filed on February 28, 1955, and was granted on April 25, 1955. The jurisdiction of this Court was invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

1. Whether the trial court should have instructed the jury that petitioner, who had been indicted for the felony of attempted evasion of income taxes (according to the statute cited in the indictment), could be convicted of the misdemeanor of filing a fraudulent return with intent to defeat the assessment.

2. Whether the trial court should also have instructed the jury that petitioner could be convicted of a misdemeanor for failure to pay a required tax, make a return, keep records, or supply required information.

3. Whether in a prosecution of a lawyer for evading his own income tax based on specific items of income alleged to be unreported, the burden of proof or the burden of going forward with the evidence may be shifted to the defendant by merely having a witness identify seven checks payable to and endorsed by the defendant, two of which are marked "fees," two marked "legal services," and the rest not marked, when the maker of the checks is available in the courtroom, and there has been offered no evidence concerning the relationship between the maker and the taxpayer, or as to when the markings were placed on the checks.

STATUTE AND RULE INVOLVED.

Internal Revenue Code of 1939:

Sec. 145. Penalties.

(a) [as amended by Sec. 5 (c), Current Tax Payment Act, c. 120, 57 Stat. 126] **Failure to File Returns, Submit Information, or Pay Tax.**—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) **Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.**—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * * *

(26 U. S. C., 1952 ed., Sec. 145.)

Sec. 3616. Penalties.

Whenever any person—

(a) **False Returns.**—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; • • •

• • • • • • • •

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(26 U. S. C., 1952 ed., Sec. 3616.)

Federal Rules of Criminal Procedure:

Rule 31. Verdict.

• • • • • • • •

(c) **Conviction of Less Offense.** The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

STATEMENT.

Petitioner, a 77-year-old Missouri lawyer, was indicted on charge of wilfully attempting to evade his income taxes for the years 1950 and 1951 by filing fraudulent returns. The statute alleged to be violated on the face of the indictment was Section 145 (b) of the Internal Revenue Code of 1939 (R. 1-2). The amounts of income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1950)	$1,526.11	$ 32.00	$ 2,526.11	$ 189.00
Count II (1951)	8,022.91	1,642.87	12,656.43	3,264.01

After a jury trial petitioner was found guilty as charged (R. 97-98). He was sentenced to imprisonment for fifteen months on each count, the terms to run concurrently, and was fined $2,500.00 on the first count (R. 100-101).

The evidence of the government may be summarized as follows:

Petitioner recorded the income he received during 1950 and 1951 in a book (Pl. Exs. 14, 15, 16; R. 47-51, 46, 58). For 1950 the total receipts reported in petitioner's tax return coincided exactly with the sum of the income recorded in the book (Pl. Ex. 1; R. 17-21, 16, 19, 47, 52). The 1951 return reported total receipts about $999.08 in excess of the income entered in the book (Pl. Ex. 2; R. 23-29, 22, 27, 49-51, 52). The case was prosecuted on the theory that in 1950 petitioner's book did not reflect all of his income from two individuals named Broadhead and Packs, and in 1951 from Packs alone and consequently the returns understated his true income. The evidence was presented in

about two hours and consisted principally of the testimony of three witnesses, Broadhead, a Pack's employee and the Internal Revenue Agent.

The Government's position was that during 1950 petitioner received $2,000 in legal fees which were neither recorded nor reported. Petitioner's books showed $1,000 received from Broadhead in March, 1950, and $1,250 received from him in June, 1950 (R. 47). Petitioner had represented Broadhead as an attorney in a case pending in Mississippi from 1949 to 1951 (R. 50). Broadhead paid him $2,000 in cash in March, 1950, and $1,250 by check in June, 1950 (R. 40). But Broadhead testified that petitioner brought in a Mississippi attorney as associate counsel and admitted that the fees of such associate attorney were not paid by Broadhead (R. 42). Moreover, Broadhead knew that the Mississippi attorney was going to be paid and that it was petitioner's responsibility to pay him. He did not know anything about the financial arrangements between petitioner and associate counsel. Associate counsel, moreover, attended every meeting that Broadhead had with petitioner and appeared in court for Broadhead (R. 41-42).

The employee of Packs (Thomas Packs Amusement Enterprises Company) identified seven cancelled checks of that concern payable to petitioner during the years 1950 and 1951, signed by Packs and endorsed by petitioner (R. 31, 33-39). But the employee had no business dealings with petitioner and did not state or know the reason for the issuance of the checks. He merely identified the checks as company records and could not testify of his own knowledge that money was paid to petitioner (R. 31-32). Moreover, Tom Packs did not testify although he spoke to the Revenue Agent handling the case in the hall near the courtroom during the trial (R. 59). Two checks were marked "Fees" (Pl. Exs. 8, 9; R. 37, 46), two of

the checks, including the only one that related to the year 1950, were marked "Legal Services" (Pl. Exs. 4, 7; R. 33, 35, 46), and the other three had no markings of purpose (Pl. Exs. 5, 6, 10; R. 33, 35, 39, 46). There was no testimony as to when these checks were so marked. Petitioner's books showed no income from Packs in 1950; they indicated income from Packs in 1951 in the amounts of $1,500 in January, $284.67 in April, and $1,500 in November (R. 49-51). The seven cancelled checks were in the following amounts: $1,000 in March, 1950, $4,000 and $500 on December 30, 1950, $284.67 in April, 1951, $3,000 and $500 in November, 1951, and $742.17 in December, 1951 (R. 33-40). The December 30, 1950, checks were received in 1951 (R. 44). The government's theory was that two of the checks were not entered in petitioner's records (Pl. Exs. 4, 10); that four of the checks were understated (Pl. Exs. 5, 6, 8 and 9) and that one was correctly entered (Pl. Exs. 7, 52-53). No other evidence was offered concerning either the relationship of petitioner and Packs or the purpose of these checks.

The only evidence of the remainder of petitioner's income was petitioner's records (Pl. Exs. 14, 15, 16; R. 47-51). The revenue agent who conducted the investigation testified that when he asked for an explanation of the unreported items petitioner stated that they did not constitute income to him and that he only recorded in his books those items which he considered to be income. Petitioner gave an explanation why the other items were not income which the agent said was not substantiated (R. 58-59). Petitioner did not take the stand at the trial and offered no evidence in his own behalf (R. 61).

Petitioner requested that the jury be instructed that it might find him guilty of a lesser crime than the one cited in the indictment. Under one of the proposed charges the jury would have been instructed to find him guilty of a

violation of Section 3616 (a) of the Internal Revenue Code of 1939 if it believed that he had delivered a false income tax return to the Collector with intent to evade the assessment of the tax (R. 93-94). Under the other proposed charge the jury would have been instructed to find him guilty of a violation of Section 145 (a) of the Internal Revenue Code of 1939 if it believed that he had wilfully failed to pay taxes, make returns, keep records, or supply information required by law (R. 92-93). The trial court refused both requests (R. 92).

The Court of Appeals unanimously affirmed the conviction (R. 111-122), holding that no lesser instruction was required because Section 3616 (a) was inapplicable to income tax violations (R. 117-121) and that a Section 145 (a) violation was not supported by the evidence (R. 116-117). The Court held, in regard to the seven Packs checks, that the foundation offered by the Government fully indicated that the receipts were income and that the transfer of the burden of proof or the burden of going forward with the evidence to the defendant was proper because there was a manifest disparity in convenience of proof and opportunity of knowledge between the defendant and the Government (R. 112-115).

SUMMARY OF ARGUMENT.

1. Section 3616 (a) of the Internal Revenue Code of 1939 applies to income tax derelictions. The Government so conceded in its brief opposing certiorari. It has frequently been utilized in the prosecution of income tax cases. The language "with intent to defeat or evade" clearly indicates the necessity for proof of wilfulness. The enactment of the predecessor of Section 3616 (a) as part of a Revenue Act which included income tax, its collocation in the Internal Revenue Code of 1939, and its incorporation in Section 7207 of the Internal Revenue Code of 1954 all indicate its applicability to fraudulent income tax returns. The Government also conceded that Section 3616 (a) prohibits a wilful attempt to evade income taxes by filing fraudulent returns. This view is supported by the plain language of Section 3616 (a) in proscribing against the filing of "fraudulent" returns "with intent to defeat or evade . . . the assessment." Section 145 (b) also forbids a wilful attempt to evade income tax by filing fraudulent returns.

Under an indictment, citing Section 145 (b) of the Internal Revenue Code of 1939, a felony, and charging an attempt to evade income taxes by filing a false and fraudulent return, the trial court should have instructed the jury, as requested, that defendant could be convicted of the misdemeanor under Section 3616 (a) which section, as conceded by the Government, specifically prohibits the filing of a false and fraudulent return for the purpose of evading taxes. A violation of the lesser offense was charged in the indictment. It was "necessarily included" in the allegations of the indictment under Rule 31 (c) of the Federal Rules of Criminal Procedure which authorizes a conviction for an offense "necessarily included in the offense charged" by being included in the acts alleged in the indictment and was thus sufficiently charged. A de-

fendant is informed of the "essential facts constituting the offense" by the allegations of the indictment and not by the statute cited or by the statutory definition of the greater offense. The prosecution is not limited to the statutory citation but may have every offense sufficiently charged submitted. The accused should have the same right. Moreover, the prosecution ought not to fail when it fails to prove an allegation charged if it proves sufficient facts constituting a crime of which defendant has had notice. There are state court decisions supporting this interpretation and a contrary rule has not been established by the Courts of Appeal.

Moreover, the Government concedes that a violation of Section 3616 (a) was charged by saying that Sections 3616 (a) and 145 (b) are "two statutes, each of which punishes exactly the same act." If there is no difference between the misdemeanor and the felony under the instant indictment defendant cannot be punished twice for the same acts by two statutes when the proof required for conviction is the same. And punishment for the same offense may be graver only if there is a rational basis for different treatment. State statutes allowing different punishment have been stricken down as discriminatory. Allowing punishment only under the lesser range of penalties would avoid such discrimination. It would be in accord with **United States v. Universal C. I. T. Credit Corp.**, 344 U. S. 218, which limited the amount of punishment where the Congressional intent was not clear.

The difference between a Section 3616 (a) and a Section 145 (b) violation may be that the felony requires other affirmative acts of fraud in addition to the mere filing of fraudulent returns. This rule would give effect to both statutes. A contrary holding would in effect render nugatory Section 3616 (a) if under an indictment such as the instant one, the punishment may be for the greater offense. Although **United States v. Beacon Brass Co.**, 344

U. S. 43, has said that an attempt to evade taxes "in any manner" includes the filing of a fraudulent return, it did not consider Section 3616 (a). There may be differences in degrees of wilfulness. Or the aggravating incident in the greater may be a substantial understatement of income as opposed to smaller deficiencies.

Even if a "necessarily included" offense must be embraced within the statutory definition of the greater offense, the misdemeanor under Section 3616 (a) is embraced within the greater offense of Section 145 (b). Although Sections 3616 (a) and 145 (b) are couched in different language, they cover the same type of derelictions. But if Section 3616 (a) is narrower in scope than 145 (b), it together with Section 145 (a) of the Internal Revenue Code covers the same ground as 145 (b).

2. Alternatively, the trial court should have permitted the jury to convict petitioner of a misdemeanor under Section 145 (a) of the Internal Revenue Code if it found he wilfully failed to pay taxes, make a return or supply information required by law. It is impossible to violate Section 145 (b) without offending against Section 145 (a) as every wilful attempt to evade taxes necessarily includes one or more of these misdemeanors. The felony proscribed by Section 145 (b) includes other offenses against the revenue laws. **Spies v. United States,** 317 U. S. 492. The aggravating incident for the greater offense, if required, would be some act of willful commission. A lesser instruction was supported by the evidence. Again if Section 145 (a) and Section 3616 (a) are treated as one statute, a lesser instruction is clearly required.

The burden of going forward with the evidence should not have been shifted to petitioner by the mere identification of the seven Packs checks when the maker of the checks was present in the courtroom but was not called as a witness by the Government, as the mere receipt of money

by a lawyer does not indicate income absent other circumstances indicating that it was income. It is true that the "prosecution does not have to adduce evidence to support a negative averment" when its truth could be disproved by evidence probably in defendant's control. But the Government's case must be independently established to some extent and there must be a "manifest disparity in convenience of proof and opportunity for knowledge" and "a serious practical handicap" if the prosecution must prove the proposition. Such was not the case because of the availability of Packs. The Government failed to show the investigation into leads required by **Holland v. United States**, 348 U. S. 121. Unless Packs told the revenue agent that the sum of the checks were income, petitioner's statement that the sum of these checks was not income should have been accepted. If Packs told the contrary, he should have been called as a witness. There was no evidence as to when the markings "fees" or "legal services" were placed on four of the checks. There should, therefore, be no implied admission by petitioner's endorsement. The markings were hearsay as no foundation was laid for admission under the Business Records Statutes. Moreover, the reference in petitioner's books to Packs and the date of receipt of all but two checks (one of which had no markings) shows an innocent intent. At least it was error to admit into evidence the three checks which had no markings of purpose. In the absence of these checks, the jury would also have found no criminal intent in 1950.

ARGUMENT.

I.

Section 3616 (a) of the Internal Revenue Code of 1939, a misdemeanor which forbids the filing of a fraudulent return with intent to defeat the assessment is "necessarily included in the offense charged" under an indictment charging an attempt to evade income taxes by filing a fraudulent return, a felony under Section 145 (b) of the Internal Revenue Code of 1939, the statute indorsed on the indictment, and the trial court should have instructed the jury, as requested, that petitioner could be convicted of the lesser offense.

The trial court refused a requested instruction which would have permitted the jury to convict petitioner of a misdemeanor under Section 3616 (a) of the Internal Revenue Code of 1939. The court below affirmed the conviction holding that defendant was not entitled to a lesser offense instruction because Section 3616 (a) was inapplicable to income tax violations. The court concluded "both from the language of § 3616 and the statutory context where it was formally placed, that it was never intended to apply to income tax violations" (R. 120). The court, in reaching this result, found that Section 7207 of the 1954 Internal Revenue Code which replaced Section 3616 was broad enough to apply to income tax derelictions and that the "element of willfulness, absent in § 3616 but previously consistently present in offenses relating to income tax violations, was inserted" (R. 120).

But the Government has conceded in its brief in opposition to the petition for certiorari that Section 3616 (a) does apply to income tax returns and that the court below was wrong in this premise. Brief for the United States in

Opposition, pp. 7-8. Section 3616 (a) has frequently been utilized by the government in the prosecution of income tax cases. The language "with intent to defeat or evade" clearly indicates the necessity for proof of wilfulness. Moreover, the mere omission of the word "wilful" in a criminal statute would not eliminate intent as an element of the offense. **Morissette v. United States,** 342 U. S. 246. The predecessor of Section 3616 was enacted in 1864 as part of a Revenue Act which imposed an income tax and provided for income tax returns.[1] Section 3616 is collocated in the Internal Revenue Code of 1939 next to Sections 3614 and 3615 which authorize the issuance of summons for the inspection of records for the determination of tax liability, including income tax liability. These all point to its applicability to fraudulent income tax returns. Section 3616 is incorporated into Section 7207 of the Revenue Act of 1954 which the court below found applied to income tax derelictions. It overlooked the fact however, that both the Senate and House Committee Reports relative to Section 7207 state that it did not change existing law.[2]

The applicability of Section 3616 to fraudulent income tax returns has been tacitly assumed in a number of cases. **Ex parte Cohen,** 9 Cir., 191 F. 2d 300, certiorari denied, 342 U. S. 947; **Taylor v. United States,** 9 Cir., 179 F. 2d 640, 643-644; **Kirsch v. United States,** 8 Cir., 174 F. 2d 595, 597-598; **Slick v. United States,** 7 Cir., 1 F. 2d 897; **Ex parte Berkoff,** D. Minn., 65 F. Supp. 976, 979-981;

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[1] Act of June 30, 1864, c. 173, 13 Stat. 223, 225, 226, 281-285. § 3616 was more immediately derived from R. S. § 3179.

[2] The Senate Report states: "This section, which is identical with the House Bill contains no material change in existing law." S. Rep. No. 1622, 83rd Cong., 2nd Sess. (1954) 603, 1954 U. S. Code Congressional Service 3251. The House Report is identical. H. R. Rep. No. 1337, 83rd Cong., 2nd Sess. (1954) A. 425, 1954 U. S. Code Congressional Service 1111.

United States v. Koppelman, M. D. Pa., 61 F. Supp. 1007, 1008-1009.

In regard to Section 3616 (a) the Government has also conceded that this statute specifically punishes a wilful attempt to defeat income taxes by filing fraudulent returns. The Government said in regard to both Section 3616 (a) and Section 145 (b) that they are "two statutes, each of which punishes exactly the same act. Each prohibits a wilful attempt to evade and defeat income taxes . . . whenever a taxpayer does file a false return with intent to defeat the tax, the evidence will justify a conviction under either statute." Brief for the United States in Opposition, p. 10. Section 3616 (a) makes it an offense to deliver or disclose to the collector "any false or fraudulent . . . return . . . with intent to defeat or evade the valuation, enumeration or assessment . . ." A "false" return by itself might be a return which is merely incorrect due to negligence or some other cause lacking intent and would not necessarily involve an attempt to evade taxes if it were delivered to the taxing authorities. But a "fraudulent" return would include an intent to deceive and an intent to deprive the government of taxes. A "false or fraudulent" return could by a strained construction refer to a false return only. Cf. **Rick v. United States**, D. C. Cir., 161 F. 2d 897. However, anyone who delivers or discloses a false or fraudulent return "with intent to defeat or evade the . . . assessment" is attempting to defeat and evade his taxes. There can be no real difference between this language employed in these sections. Consequently Section 145 (b) and Section 3616 (a) both prohibit a wilful attempt to evade and defeat income taxes and both offenses were charged under the instant indictment if **United States v. Beacon Brass Co.**, 344 U. S. 43, 46, is correct in holding the felony includes evasion by means of a fraudulent return.

Under Rule 31 (c) a lesser offense must be "necessarily included in the offense charged."[3] The Government's position is "To be necessarily included in the greater offense the lesser offense must be such that it is impossible to commit the greater without first having committed the lesser," or, in essence, that the lesser offense must be included in the statutory definition of the greater offense. The Government says that Section 3616 (a) is not so included in Section 145 (b) because the felony may be committed without perpetrating the misdemeanor and that "one cannot commit the misdemeanor of delivery of a false income tax return with intent to evade the assessment without at the same time committing the felony of attempted income tax evasion." Brief for the United States in Opposition, pp. 10-11. We believe that reason supports the interpretation that the language employed in Rule 31 (c) comprehends that a lesser offense is "necessarily included" if it is fairly charged by the indictment. A lesser offense is fairly charged if it is included in the acts alleged in the indictment as constituting the greater offense whether or not the greater may be committed without perpetrating the lesser.[4]

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[3] Under a charge of murder, defendant may be convicted of manslaughter. *Stevenson v. United States*, 162 U. S. 313, 315; *Wallace v. United States*, 162 U. S. 466, 472. Under an indictment charging robbery, defendant may be convicted of larceny. *Lamore v. United States*, D. C. Cir., 136 F. 2d 766. A suggestion as to its application under the Gambler's Occupational Tax Act, 26 U. S. C. A., former §§ 3294 (c), 2707 (b) is found in *United States v. Kahringer*, 3 Cir., 210 F. 2d 565, 571-572.

[4] Rule 31 (c) was a restatement of existing law, 18 U. S. C. A., former § 565, which provided:

> "In all criminal causes the defendant may be found guilty of any offense the commission of which is *necessarily included in that with which he is charged* in the indictment, or may be found guilty of an attempt to commit the offense so charged, if such attempt be itself a separate offense."

The emphasized portion contains no suggestion of the limitation urged by the government.

It is elementary that an accused must be given fair warning of the charges facing him. The nature of his accusation is learned from the allegations of the indictment and not from any particular statute.[5] "It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment if the charges made are embraced by some statute." **Williams v. United States**, 168 U. S. 382, 389.[6] Indeed the accused must be prepared to defend in one count of an indictment against allegations which may constitute violations of several statutes. In **United States v. Tommasello**, 2 Cir., 160 F. 2d 348, 351, one count of the indictment was drawn under a particular statute, but stated facts sufficient to plead an offense under two other statutes as well. The court held that a conviction might be had under any of the three statutes.

Since the prosecution is not limited to the statutory citation in the indictment where the language is sufficient to charge still another or other offenses, the defendant is entitled to have each such other offense submitted to the jury even if it is lesser in nature. Failure to charge as to each such offense supported by the evidence might well result in a verdict of guilt on a major offense because the jury believes the defendant guilty of only certain elements of wrongdoing but when left with the alternative of either entirely acquitting him or convicting him, they will find guilt on the only offense submitted.

The construction urged aids the prosecution as well as the accused. There are occasions where a defendant is

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[5] Rule 7 (c), Federal Rules of Criminal Procedure, states in part: "The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

[6] The word "feloniously" in the indictment probably does not add to the allegations since its omission does not affect the accusation. *United States v. Staats*, 8 How. 41, 49 U. S. 41; *United States v. Amorosa*, 3 Cir., 107 F. 2d 596, 598.

shown to be guilty of some wrong doing but his derelictions are not so aggravating as to support every allegation in the indictment. The proof may fail as far as one of the elements charged is concerned. Under such circumstances the defendant should not be acquitted and then tried anew for the lesser violation. The prosecution should request a lesser offense instruction. There is more reason for this view than one requiring him to defend against the statutory definition of the major crime charged. There is no injustice to require him to face the remainder of the allegations in the indictment. "It is the statutory as well as a common law rule that a prosecution ought not to fail or the lack of proof that the crime charged is shown to have been committed in the lesser degree than charged in the indictment." **People ex rel. Poulous v. McDonnell**, 302 N. Y. 89, 91, 96 N. E. 2d 614, 615.

We do not believe any contrary rule has been established by the various circuits. The Ninth Circuit in **Giles v. United States**, 144 F. (2d) 860, 861, quoted with approval the following definition of necessarily included offense as used in **House v. State**, 186 Ind. 593, 117 N. E. 647: "To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." It should be noted that in **Giles** there was no evidence to support the lesser offense and no such instruction was requested.

However, in **Barbeau v. United States**, 193 F. (2d) 945, 946-948, the Ninth Circuit held that negligent homicide was included under a first-degree murder charge, which alleged purposeful killing, with deliberation and premeditation. It is not impossible to commit first-degree murder without first having committed a negligent homicide. And the killing of a person by negligence is not necessarily included in the statutory definition of murder in the first degree, which is a killing done purposely with deliberation

and premeditation. The most that can be said is that the lesser offense was fairly charged in the indictment.

In **Gaunt v. United States**, 1 Cir., 184 F. 2d 284, 289-290, one count of the indictment charged an attempt to evade income taxes by filing a fraudulent return. Another count charged the making of fraudulent statements within the jurisdiction of a department of the United States by filing a fraudulent income tax return in violation of 18 U. S. C. A., former § 80 (now 18 U. S. C. A., § 1001). The court held that the latter charged a crime within the crime charged in the former. If this offense is embraced within Section 145 (b), a fortiori, Section 3616 (a) is so embraced.

There are state decisions which hold that the lesser offense may be included in the acts set forth in the indictment. **People v. Miller**, 143 App. Div. 215, 128 N. Y. S. 549, 550, affd., 202 N. Y. 618, 96 N. E. 1125; **People ex rel. Poulous v. McDonnell**, supra. In jurisdictions where "necessarily included" is construed to mean that the lesser offense must be included in the statutory definition of the greater offense, there is an exception. Where an indictment charges not only the major offense, but also in terms charges a lesser offense, the accused may be convicted of the lesser offense even though it does not form a constituent part of the major offense charged. In **Stapleton v. Commonwealth**, 140 Va. 475, 124 S. E. 237, an indictment charged both burglary and larceny and the defendant was convicted of larceny alone. The court found that although larceny was not a constituent part of burglary, a conviction for the lesser crime of larceny was proper. The court there said (124 S. E. at 240-241):

> "The case does not fall within the control or influence of such cases as the Hardy and Curry Case, 17 Grat. (58 Va.) 592, strongly relied on for the accused in which the indictment in terms charges only one major offense, which is held to also embrace the charge

of all lesser offenses which are incident to and constitute elements of the major offense. In such cases, only such lesser offense as are in their nature constituent parts of the major offense can be considered as charged in the indictment, and conviction of such character of lesser offense only can be had and enforced under such an indictment. But such an indictment as that in the instant case is not one which in terms charges only one major offense. It in terms charges both the major and the lesser offense in question, and the conviction of the lesser offense charged may be had and enforced under such an indictment, because, as aforesaid, the indictment contains a competent specific charge of the lesser offense at common law, and not because the lesser offense is of such character that it is an element of the major offense charged."

The view that the greater offense must be embraced within the statutory definition of the lesser or that the allegations of the indictment describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser is followed by other states. **Watson v. State**, 116 Ga. 607, 43 S. E. 32; **Moore v. State**, 151 Ga. 648, 662, 663, 108 S. E. 47, 54; **Barton v. State**, 58 Ga. App. 554, 199 S. E. 357.

In the instant case since the Government says that Sections 3616 (a) and 145 (b) are "two statutes, each of which punishes exactly the same act", the allegations of the indictment charged both the greater and the lesser offenses. The lesser was therefore "necessarily included" as it was fairly charged by being included in the averments of the indictment.

It does not follow that petitioner could only be convicted of the greater offense if the Government is correct in its contention that there is no difference between the misdemeanor and the felony under the instant indictment.

If such be the case, the court should have instructed the jury that defendant could only be convicted of the lesser offense. For if there be no difference, defendant could not be punished under both statutes without offending the double jeopardy provision under the fifth amendment to the United States Constitution.[7] A defendant may be convicted of two separate offenses arising from a single act only if each requires proof of a fact not essential to the other. **Pereira v. United States**, 347 U. S. 1, 9; **United States v. Beacon Brass Co.**, 344 U. S. 43, 45.

When the crimes committed by different individuals are the same, they must be punished in the same manner, by the same range of punishment. Punishment for the same offense may be more severe only if there is a rational basis for difference in punishment such as a prior conviction. E. g., **Moore v. Missouri**, 159 U. S. 673, 678; **Commonwealth of Pennsylvania ex rel. Sullivan v. Ashe**, 302 U. S. 51, 54. An unreasonable discrimination in punishment among defendants would violate the due process clause of the Fifth Amendment to the United States Constitution. In **State v. Cory**, 282 P. 2d 1054 (Or. 1954), a portion of a habitual criminal act giving the district attorney unlimited discretion to determine whether he will or will not proceed against a person who had previously been convicted of a felony was held to deny equal protection of the law because there was no classification to determine under what circumstances the information should be filed. And in **State v. Pirkey**, 281 P. 2d 698 (Or. 1954), a statute which delegated to grand jury or magistrate power to determine in advance whether to charge a defendant with a felony or a misdemeanor for the same offense

[7] Of course, if there is an aggravating incident distinguishing the greater and lesser offenses and both offenses are submitted to the jury, punishment may be under the more inclusive count if a defendant is either found guilty of the greater offense or found guilty of both. *Ekberg v. United States*, 1 Cir., 167 F. 2d 380, 385-386.

without fixing a standard for the exercise of that discretion was held to violate the equal protection clause of the state and federal constitution and an indictment drawn pursuant to such statute was dismissed.

Less drastic would be the choice of the lighter range of punishment. In determining the unit of punishment, **United States v. Universal C. I. T. Credit Corp.**, 344 U. S. 218, 221-222, held that before a court should choose the harsher alternative, Congress should be required to have spoken "in language that is clear and definite." Such a choice here would be in accord with the rule of strict construction of criminal statutes in favor of the accused. This would end the only discrimination of which a defendant could complain. It would also prevent an implied repeal of Section 3616 (a). Prosecutions under Section 145 (b) could still be had if the indictment alleged acts of concealment if such acts are not also covered by Section 3616. At the very least, the choice should be left to the petit jury.

If a wilful attempt to evade taxes by filing a fraudulent return under Section 145 (b) contains some aggravating incident not found in the same offense under Section 3616 (a), the incidents that we conceive would not preclude a lesser offense instruction. The difference may be dependent on the taxpayer's state of mind. It may be analogous to the difference between murder and manslaughter, which is dependent on the amount of deliberation prior to the act of homicide. Elaborate schemes of concealment would probably be present in the felony while single and sporadic omissions in the taxpayer's books would be symptomatic of the misdemeanor. Whether or not the evasion was committed with a lesser quantum of wilfulness to constitute the misdemeanor or was perpetrated with aggravated wilfulness to constitute the felony would be a jury question.

A related distinction is suggested in **Spies v. United States**, 317 U. S. 492, 499:

> "We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some wilful commissions in addition to the wilful omissions that make up the list of misdemeanors. **Wilful but passive neglect of the statutory duty may constitute the lesser offense,** but to combine with it a wilful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony."

A misdemeanor under Section 3616 would be committed by "willful but passive neglect of the statutory duty" and would in essence be a form of aggravated neglect. For example, a taxpayer by willful neglect may omit to keep accurate books and records and, as a result of his neglect, he knowingly files a false and fraudulent return with intent to defeat the tax. He would be guilty of violating Section 3616 (a). If, on the other hand, he purposely and deliberately omits items of income from his books and records for the purpose of evading taxes and then files a fraudulent return, he has violated Section 145 (b). The difference again would be dependent on the taxpayer's state of mind and may be slight. But the difference between the degrees of murder and the difference between murder and manslaughter is also mental and may be slight. The aggravating element which distinguishes the felony and the misdemeanor would be thus primarily a mental one. Or the aggravating incident may be the difference between a substantial understatement of income and a small understatement of income. Such a distinction is recognized in the policy of the government in choosing which applicable law to invoke. Whether an understatement is substantial or not would be a jury question.

It may be that the mere filing of a fraudulent return in an attempt to defeat taxes does not constitute a felony

violation in the absence of other affirmative acts of fraud. **Spies v. United States**, 317 U. S. 492, supports this view in its holding that the mere failure to file a return or the mere failure to pay a tax, misdemeanors under Section 145 (a), do not without more authorize a conviction of the felony. But this Court has said in **United States v. Beacon Brass Co.**, 344 U. S. 77, that attempts to evade taxes by filing false returns constitute a violation of Section 145 (b). That case specifically held that an indictment charging a defendant with making oral fraudulent statements to a Treasury agent for the purpose of evading taxes was punishable under Section 145 (b) and not under Section 1001 of the Criminal Code, 18 U. S. C. A., § 1001. Whether or not Section 3616 (a) was applicable to the allegations of that indictment was not considered. This view would require the overruling of **Beacon Brass.** It would also mean that the phrase "in any manner" as used in Section 145 (b) by implication excludes the specific misdemeanors that Congress has proscribed. It should be noted that **Beacon Brass** did not consider Section 3616 (a). Where there are two acts on the same subject matter, effect should be given to both, if possible. **United States v. Borden Co.**, 308 U. S. 188, 198. Effect would be given to both statutes by holding that the mere wilful filing of a fraudulent return with intent to defeat taxes only constituted a misdemeanor under Section 3616 (a). Under this view the instant indictment only charges a violation of the lesser offense.

Even if the lesser offense must be necessarily included in the statutory definition of the crime for which defendant is indicted, petitioner was still entitled to an instruction as to a lesser offense. The phrase "in any manner," as used in Section 145 (b), is not employed in a vacuum but has to be considered in relationship to the entire tax structure and the possible methods of tax evasion. It is

not without limitation.[8] In a tax-collecting system which, despite use of the withholding device, continues to rely "largely upon the taxpayer's own disclosures" (**Spies v. United States**, supra, at 495; see also **United States v. Murdock**, 290 U. S. 389, 395-396), the most obvious "manner" in which evasion or defeat is likely to be attempted is a false statement to the Treasury of the facts upon which the tax is based. This plain fact is highlighted in this Court's **Spies** opinion by the examples given (317 U. S., at 499):

> "Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner.' By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind and **any conduct, the likely effect of which would be to mislead or to conceal.** If the tax-evasion motive plays any part in such conduct the offense may be made out."

Spies illustrates the variety of conduct from which a violation of Section 145 (b) might be inferred. Ultimately, in each of these illustrations, the essence of the wrongful attempt lies in misrepresentations of fact to the taxing officials. Thus, "keeping a double set of books,

[8] In *United States v. Noveck*, 273 U. S. 202, it was held not to be so comprehensive as to impliedly repeal, as to false returns, the general perjury statute.

making false entries or alterations, or false invoices or documents" would not fall under Section 145 (b) were their purpose anything other than "to mislead or to conceal."

Section 3616 (a) forbids not only the delivery of "any false or fraudulent lists, return, account or statement" but also proscribes against the disclosure of such items. Since every reported tax evasion case either contains a false statement or false disclosure to a government representative, the language of Section 3616 is as broad in fact as Section 145 (b).[9]

The fact that convictions were sustained in **United States v. Smith,** 3 Cir., 214 F. 2d 887, and **United States v. Kafes,** 3 Cir., 206 F. 2d 905, where the taxpayer did not file any return does not make Section 145 (b) broader in scope than Section 3616 (a). In the **Spies** case this Court held that the willful attempt to evade of Section 145 (b) could not be established by mere proof of failure to file a return or pay a tax but that some willful commission was necessary. This willful commission is either a false

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[9] Under Section 38 Eighth of the Corporation Excise Tax Act of 1909 (36 Stat. 11, 117) and Section 11 F of the Income Tax Act of 1913 (38 Stat. 114, 171), it was an offense to make "any false or fraudulent return, or statement, with intent to defeat or evade the assessment * * *." Similar provisions appeared in Section 18 of the Revenue Act of 1916 (39 Stat. 756, 775) and Section 1209 of the Revenue Act of 1917 (40 Stat. 300, 336). Section 253 of the Revenue Act of 1918 (40 Stat. 1057, 1085), introducing the language now found in Section 145 (b), declared that anyone "who willfully attempts in any manner to defeat or evade the (income) tax imposed by this title, shall be guilty of a misdemeanor * * *." See also Section 1308 (b) of the same Act, 40 Stat. 1143. This provision was reenacted in the Revenue Act of 1921, Section 253 (42 Stat. 227, 268). In 1924, the provision was enacted as Section 1017 (b) of the Revenue Act of 1924 (43 Stat. 253, 344) as a felony in the language now found in Section 145 (b) of the Code, and was carried forward in subsequent Revenue Acts and into the Code. 44 Stat. 9, 116; 45 Stat. 791, 835; 47 Stat. 169, 217; 48 Stat. 680, 725; 49 Stat. 1648, 1703; 52 Stat. 447, 513; 53 Stat. 1, 63.

statement or disclosure with intent to deceive. This is the essence of this offense and such acts of commission were present in both **Smith** and **Kafes.** The defendant in the **Kafes** case did not keep proper books of account and therefore one can infer that he disclosed a false account to a government representative in violation of Section 3616 (a). And in the **Smith** case defendant made false representations to revenue agents and altered his records which undoubtedly led to a false disclosure. These two cases mean that a taxpayer who fails to file a return is not immune from a tax evasion prosecution if he makes false disclosures to agents with intent to defeat taxes.

Assuming further that Section 3616 is not as broad as Section 145 (b), a lesser instruction still should have been given. Section 3616 and Section 145 (a) should be considered as if they were one statute. Considering these statutes as one, it is clear that there can be no violation of Section 145 (b) without violating these combined misdemeanor provisions. Embraced in every violation of the major offense is a lesser dereliction. Whether a lesser offense instruction is required should not rest on the narrow ground that these two misdemeanor sections are in two different statutes as the same Congressional intent is involved whether they are embodied in the same or different statutes.

II.

An offense under Section 145 (a) of the Internal Revenue Code of 1939, a misdemeanor which forbids the wilful failure to pay a tax, make a return, keep required records or supply required information was "necessarily included in the offense charged" and the trial court should have so instructed the jury.

The trial Court also refused a requested instruction which would have permitted the jury to convict petitioner of a misdemeanor under Section 145 (a) of the Internal

Revenue Code of 1939 if it found that he wilfully failed to pay taxes, make a return, keep records, or supply information required by law. The court held, in regard to § 145 (a), that there was no evidence offered "that defendant failed to file a return or to show the willful failure to pay the tax when due, except insofar as willfulness was involved in the charged willful and felonious attempt to evade the payment of taxes owed" and therefore it was not error to instruct on an offense not presented by the evidence (R. 116-117).

Section 145 (a) makes it an offense to fail to pay a tax,[10] to fail to make a return for the purpose of the computation, assessment or collection of a tax,[11] to fail to keep any records for such tax purposes, or to fail to supply information for such purposes.[12]

It is impossible to violate Section 145 (b) without violating Section 145 (a). If a "necessarily included" offense means that "it is impossible to commit the greater without first having committed the lesser", then this misdemeanor is included in the felony involved. Every wilful attempt to evade income taxes necessarily includes a default in payment, a failure to make a return, a failure to keep proper records, or a failure to supply required information. One or more violations of Section 145 (a) are "necessarily included" in every violation of Section 145 (b) and one or more offenses under the former section are therefore necessarily included in an offense under the latter section. A wilful attempt to evade taxes in any manner will always include one or more of the omissions proscribed by Section 145 (a). One default always present in the greater offense is that a tax be due. A

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[10] *Spies v. United States*, 317 U. S. 492, 496.

[11] *United States v. Sullivan*, 274 U. S. 259, 262.

[12] *United States v. Murdock*, 290 U. S. 389, 391.

failure to keep required records is present in every case. Section 54 of the Internal Revenue Code of 1954. imposes a duty on every taxpayer to "keep such records . . . as the Commissioner, with the approval of the Secretary, may from time to time prescribe." The records required to be kept are prescribed in the Regulations. Treasury Regulation 111, § 29.54-1, provides with certain exceptions that "for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax," permanent records shall be kept "as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown by any return . . .". Cf. **United States v. Carroll,** 345 U. S. 457, 459-460. The examples of indicia of fraud pointed out in **Spies v. United States,** 317 U. S. 492, all show failures to keep records which truly reflect income. A failure to supply the required information is present in cases where the evidence shows the defendant kept a double set of books, made false entries, used false invoices, destroyed books or records, concealed assets, concealed his income source, or handled his affairs to avoid making the usual records. The misdemeanor and the felony both require a failure to make a disclosure as to the amount of income of the taxpayer. The failure to file returns may constitute a violation of the felony section if other affirmative aggravating acts are shown.

Spies v. United States, 317 U. S. 492, presented the question as to whether a wilful failure to file a return, together with a wilful failure to pay a tax without other evidence constituted an attempt to evade a tax within the meaning of Section 145 (b). Although this Court held that it took more than the sum of two such misdemeanors to make a felony violation under Section 145 (b), it concluded that a felony may include lesser offenses in combination with each other or with other elements and that the felony proscribed by Section 145 (b) included one or several of the other of-

fenses against the revenue laws. This Court also pointed out in the **Spies** case that the felony involved "some wilful commission in addition to the willful omissions that make up the list of misdemeanors". The willful commission would be the aggravating offense lifting the misdemeanor into the felony.

The evidence in this case required such an instruction. The government's theory was that the defendant's records did not reflect all of his income. The evidence, therefore, must support the inference that he failed to keep the records required by Section 145 (a). The government also contended that defendant did not pay all of the tax that he should have paid and thus proved a failure to pay tax. The government's position also supports the inference that defendant failed to supply information and failed to make a complete return of all of his income. If Section 145 (a) in proscribing an offense for failure to make a return also includes a failure to make a complete return, then this too would be embraced by the evidence.

Clearly if both Section 3616 (a) and Section 145 (a) are considered as if they were one statute, every violation of Section 145 (b) offends against the misdemeanor provision. Where there is evidence to show either a felony or one or more misdemeanors the prosecuting officials should not have the sole choice of deciding the offense of which the accused may be found guilty. If there are several offenses possible under the evidence and if there is a lesser offense embraced within a greater offense, defendant should be entitled, when he so requests, to the verdict of the jury on this issue in accordance with Rule 31 of the Federal Rules of Criminal Procedure.

III.

The mere identification of seven checks payable to and endorsed by petitioner did not establish a sufficient foundation to shift the burden of going forward with the evidence to petitioner and this foundation was likewise insufficient to justify their admission into evidence.

Determinative of the issues relative to the sufficiency of the evidence are the seven Packs checks. The only other item of income alleged to be unreported was a $2000 cash fee from Broadhead, in 1950, $1000 of which was reported as income and so listed on petitioner's books (R. 47). This item was received under circumstances indicating the splitting of a fee between petitioner and another lawyer (R. 42). The court held, in regard to the seven Packs checks, that the foundation offered by the Government fully indicated that all the receipts were income and that the transfer of the burden of proof or the burden of going forward with the evidence to the defendant was proper because there was a manifest disparity in convenience of proof and opportunity of knowledge between the defendant and the Government as these checks were payable to defendant under circumstances indicative that they were for legal services, and that this evidence was fairly indicative of income received by defendant. The court stated that this evidence, "coupled with evidence that defendant attempted to conceal a portion of it by not entering it on his books and not reporting a substantial amount in his returns, was sufficient to show the willful filing of a false return" (R. 112-115, 121).

The decision below rests primarily on a presumption that the mere receipt of money from a known source constitutes income even when the payer of the money is present in the courtroom if the government does not desire to call him as a witness. Neither the existing precedents nor the facts of this case warrant such a drastic shifting of the burden of proof in a criminal case.

These seven checks were identified by the Secretary of the Thomas Packs Amusement Company, who did not know the reason for their issuance (R. 31-32). Thomas Packs, who had full knowledge of why the checks were issued, was in the courtroom and had talked to the revenue agent, but was not called to testify (R. 59). The name Packs was clearly marked in petitioner's book. Petitioner also told the agent that he only recorded in his books items of income (R. 58-59).

The record, however, does not show whether petitioner, a lawyer, represented a client who had a claim against Packs, or what relationship existed between him and the Packs Amusement Company. Most amounts received by the average lawyer do not represent income. In view of the nature of the legal profession, the mere receipt of money does not represent income. Before the burden of proof should have been shifted, evidence should have been introduced to show that petitioner received the checks under circumstances indicating some omission of income. The government's theory was that any money received by a lawyer is income unless he can explain or convince the jury that the money is not income. The burden of proof or the burden of going forward with the evidence should not be so shifted to defendant.

It is true that "the prosecution does not have to adduce positive evidence to support a negative averment, the truth of which is fairly indicated by established circumstances and which, if untrue, could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control." **Rossi v. United States**, 289 U. S. 89, 91-92. See also **Morrison v. California**, 291 U. S. 82, 88. But the tests recently reiterated in **United States v. Fleischman**, 339 U. S. 349, 361, emphasize that before the burden of proof may be shifted, the government's case must be independently established to some extent, and there must be a "manifest disparity in

convenience of proof and opportunity for knowledge." The inculpatory evidence must have "at least a sinister significance" and there must be "a serious practical handicap" if the prosecution must prove the negative proposition.

The court below agreed that this evidence had no sinister significance. Packs' name was identified in defendant's records and the receipt of money was, therefore, not from an unidentified source. Nor was there any disparity in convenience or any serious handicap on the prosecution. Packs was alive, present in the courtroom and could have been called by the government to show the circumstances under which the checks were made payable to defendant. In the absence of his testimony there were insufficient circumstances to indicate that the checks represented income above the amounts shown in petitioner's income book.

A component of the conclusion of the court below is that the government's investigation did not substantiate petitioner's statement that the total amounts represented on these checks were not income to him. This coupled with the reference to Packs in his records was a lead whose validity the Government was required to investigate. "When the Government fails to show an investigation into the validity of such leads, the trial court might consider them as true and the Government's case insufficient to go to the jury." **Holland v. United States**, 348 U. S. 121, 135-136.

Such an investigation should have included an interview with Thomas Packs. Unless Packs said that the checks were income, the revenue agent could not conclude that defendant's statement could not be substantiated. If Packs told the agent that the checks were income, he should have been called as a witness by the government. And if, while testifying, he denied that the checks were income he could be cross-examined as a

hostile witness. **Finnegan v. United States,** 8 Cir., 204 F. (2d) 105, 111; **Banks v. United States,** 8 Cir., 204 F. (2d) 666, 671. The failure to call Packs as a witness leaves either the conclusion that Packs never told the revenue agent that the checks were income and, if so, the government's investigation was insufficient and did not warrant the conclusion that the checks were income, or the conclusion that there was no "disparity in convenience of proof or opportunity for knowledge" as Packs could have been called as a witness. Failure to call a material witness, without good cause shown, justifies the inference that the testimony of the witness would have been unfavorable. **Wesson v. United States,** 8 Cir., 172 F. 2d 931, 936; **Ford v. United States,** 5 Cir., 210 F. 2d 313, 317; **Schumacher v. United States,** 8 Cir., 216 F. 2d 780, 787.

This Court should not establish a rule allowing the government in a criminal case to make a prima facie case of the receipt of income by the mere showing of the receipt of a check. Otherwise a harsh rule would be established as the jury is at liberty to disregard any explanation offered on behalf of defendant as to the nature of the funds received.

It is true that two checks were marked "fees" and two checks were marked "legal services". These markings were hearsay and a hearsay objection to the checks was made and overruled (R. 46). No foundation was laid that these markings were made in the regular course of business and that "it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter", as required by the Business Records Statute, 28 U. S. C., § 1732.[13] These markings, there-

[13] 28 U. S. C. A., § 1732 provides:

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event,

fore, should have no probative value. In any event, these markings should not be determinative of the issues. The absence of evidence as to when these markings were placed on the checks would preclude any implied admission that these checks represented "fees" to petitioner and "legal services" rendered by him. Besides, the maker's marked purpose may be incorrect. He may mislabel a payment or he may be seeking tax deductions to which he is not entitled. The markings may apply to an ultimate recipient other than petitioner. It should not be overlooked that the books of petitioner in naming Packs and the date of receipt of the checks only excluded a reference to two checks, one in 1950 (Pl. Ex. 4) and one in 1951 (Pl. Ex. 10). The latter check also had no markings of purpose. The net result is that only one check is not noted in the books.

It was at least error to admit into evidence the three checks totaling $5,242.17 which had no markings (Pl. Exs. 5, 6, 10; R. 33, 35, 39, 46).[14] Two of these checks totaling

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shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business', as used in this section, includes business, profession, occupation, and calling of every kind."

[14] We believe that the admissibility into evidence of all seven checks was a "subsidiary question fairly comprised" within the questions presented in Question 3 of the petition for certiorari which is in substance the same as Question 3 in this brief. The body of the petition commenced the argument on this point as follows: "The court below in holding that the evidence was sufficient and that a sufficient foundation was laid for the admission of the seven Packs checks has gone beyond the permissible limits set forth in Holland v. United States . . ." The court below also considered these issues intertwined (R. 112-115). If this issue is not in the questions presented, it is a plain error which the court may notice at its option.

$4500 were issued on the same day, December 30, 1950 and entered on defendant's books as $1500. The other check in the amount of $742.17 was not entered. There were no circumstances to indicate that the balance of these amounts not on petitioner's books were income to him.

In 1950, there remains the $2000 cash Broadhead fee reported as $1000. The argument that this fee was split with a Mississippi lawyer would probably been accepted if all or part of the Packs check had been rejected by the court. The checks were also used to establish petitioner's intent in 1950. The jury would have in all likelihood found an innocent intent in the absence of these checks.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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Counsel for Petitioner.

August, 1955.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 37

PAUL DILLON, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUGGESTION OF MOOTNESS

We have been informed that the petitioner died on October 20, 1955. Accordingly, it is suggested that the writ of certiorari be dismissed and the case remanded to the Court of Appeals for such further action as law and justice may require. *American Tobacco Co.* v. *United States,* 328 U. S. 781, 815; *Singer* v. *United States,* 323 U. S. 338, 346; *Johnson* v. *United States,* 319 U. S. 503, 520; *United States* v. *Dunne,* 173 Fed. 254 (C. A. 9); *United States* v. *Pomeroy,* 152 Fed. 279 (S. D. N. Y.).

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

OCTOBER 1955.

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No. 37. DILLON *v.* UNITED STATES. Certiorari, 349 U. S. 914, to the United States Court of Appeals for the Eighth Circuit. *Per Curiam:* The writ of certiorari is dismissed and the case is remanded to the Court of Appeals for such further action as law and justice may require. *Solicitor General Sobeloff* filed a Suggestion of Mootness. Reported below: 218 F. 2d 97.